92-931

OCTOBER TERM, 1992

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

Case No. _____

HARRY K. SINGLETARY, Secretary
Florida Department of Corrections,

Petitioner,

v.

DOUGLAS RAY MEEKS,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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3 pp

INTRODUCTION

The Florida Attorney General asserts that certiorari review is warranted because of an alleged conflict between the decision of the Eleventh Circuit Court of Appeals and this Court's decision in Keeney v. Tamayo-Reyes, 112 S.Ct. 1715 (1992). In Tamayo-Reyes, the defendant had failed to present facts material to his claims when the state courts allowed him the opportunity to do so -- the case was thus subject to a lack of exhaustion and an adequate and independent state bar defense in the federal court. This Court ruled that "cause and prejudice" for the default or "a fundamental miscarriage of justice" would have to be established before relief could be afforded in the federal court. Keeney v. Tamayo-Reyes, 112 S.Ct. at 1721.

Although relying on Tamayo-Reyes, the State's petition does not identify any aspect of the claims on which the Court of Appeals found evidentiary resolution appropriate in Mr. Meeks' case which were either unexhausted in the state courts or subject to a procedural bar. Indeed, the State concedes that the same facts proffered by Mr. Meeks to the state courts were alleged by Mr. Meeks' petition to the federal court. See Petition for Writ of Certiorari (cited subsequently herein as "Petition"), pp. 21-22. The State did not raise any lack of exhaustion, deliberate bypass or procedural default defense in District Court or Court of Appeals. See Meeks v. Singletary, 963 F.2d 316, 320 n.5 (11th Cir. 1992). To the contrary, the State conceded that the claims on

which a hearing was ordered were before the federal courts on their merits.

As this petition discusses, the state courts failed to afford necessary evidentiary resolution in Mr. Meeks' case. The state supreme court itself has now recognized that the limited hearing conducted in the state court did not resolve many of the relevant issues. See Meeks v. Dugger, 576 So.2d 713, 716 (Fla. 1991) (remanding for an evidentiary hearing). The Court of Appeals also recognized that the limited state court hearing neither addressed nor resolved the relevant issues. Meeks v. Singletary, 963 F.2d 316, 319-20 (11th Cir. 1992).

The facts pled are sufficient to "entitle [Mr. Meeks] to relief." Id. at 319. The State has never asserted -- in its current petition, in the District Court or in the Court of Appeals -- which of those facts are subject to a lack of exhaustion or procedural default defense and, indeed, has all but conceded that it can make no such assertion. See Petition, pp. 21-22 (conceding that "same facts" proffered to the state and federal courts). The state courts not only failed to afford resolution to the claims on which the Court of Appeals found a hearing necessary, they themselves have now acknowledged that an evidentiary hearing is necessary on certain issues. Meeks v. Dugger, 576 So. 2d at 716. Given these circumstances and the substantiality of Mr. Meeks' claims, the Court of Appeals concluded that a hearing is necessary. Meeks, 963 F.2d at 719-20.

The Eleventh Circuit Court of Appeals is quite aware of and faithful to this Court's decision in Keeney v. Tamayo-Reyes. See e.g., Card v. Singletary, ___ F.2d ___, No. 88-3729, slip op. at 8 n.4 (11th Cir. Dec. 28, 1992) (discussing applicability of Tamayo-Reyes). When the State sought rehearing and en banc review below -- presenting for the first time the "Tamayo-Reyes argument" asserted by its current petition -- the Court of Appeals denied the petition with no member of the Court suggesting that the panel's unanimous ruing was in error. Even there, the State could not identify any aspect of Mr. Meeks' claim which is unexhausted or subject to procedural default.

Given the dearth of resolution in the state courts; the State's consistent inability to identify what it is about Mr. Meeks' claim which is procedurally barred or unexhausted; the State's failure to even assert such defenses in the District Court, in its briefs to the Court of Appeals or in its oral argument in the Court of Appeals, see Boykins v. Wainwright, 737 F.2d 1539, 1545 (11th Cir. 1990) (State waives lack of exhaustion or procedural default defenses by failing to raise them in a timely fashion); Francis v. Dugger, 908 F.2d 696, 705 n.2 (11th Cir. 1990) (same); and the substantial nature of the claims (see Statement of the Case, infra, discussing the record), the Court of Appeals' appropriately ruled that a hearing is necessary. The ruling of the Court of Appeals is consistent with this Court's precedents in habeas cases, including the ruling in Tamayo-Reyes itself. In this case it is the state courts, not the habeas petitioner, who "failed

to take advantage of opportunities" for resolution in state court proceedings. Tamayo-Reyes, 112 S.Ct. at 1715.

As this response discusses, there is no conflict between the decision of the Court of Appeals and Keeney v. Tamayo-Reyes or any other precedent. Although the certiorari petition presents the Florida Attorney General's disagreement with the Court of Appeals' conclusion, it presents neither a substantial question nor a conflict necessitating certiorari review.

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OPINIONS BELOW

In 1991, the Florida Supreme Court relied on Respondent's former trial defense counsel's affidavit which explained that counsel believed he was constrained in developing mitigating evidence and therefore did not investigate, develop or present nonstatutory mitigating evidence. Meeks v. Dugger, 576 So. 2d 713, 716 (Fla. 1991). As a result of those capital sentencing deficiencies, the fact that Mr. Meeks submitted "substantial nonstatutory mitigating evidence [which] could have been presented" at sentencing, id. at 716, and the State's concession of capital sentencing error, id. at 716, the Florida Supreme Court remanded for an evidentiary hearing in the trial court. Meeks, 576 So. 2d at 716. The State did not seek certiorari review respecting the Florida Supreme Court's ruling. The Eleventh Circuit Court of Appeals discussed and relied on this Florida Supreme Court decision. Meeks v. Singletary, 963 F.2d 316, 317, 319 (11th Cir. 1992).

The Florida Supreme Court's 1991 opinion in this case was not included in the Petitioner's appendix to the petition for writ of certiorari. A copy of this opinion (Meeks v. Dugger) is appended to this response, as is a copy of the opinion of the United States Court of Appeals for the Eleventh Circuit (Meeks v. Singletary) respecting which the State now seeks certiorari review.

JURISDICTION

The Respondent agrees with the Petitioner's statement.

CONSTITUTIONAL PROVISIONS INVOLVED

The Respondent agrees with the Petitioner that this case involves the Eighth and Fourteenth Amendments to the United States Constitution. The Respondent also submits that this case involves the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the ... right ... to have the assistance of counsel....

The Respondent submits that this case involves no Tenth Amendment issues.

STATEMENT OF THE CASE

Supported by no citation to the record whatsoever, the Attorney General's Statement of the Case does not appropriately outline what this case actually involves. The petition also fails adequately to discuss the actual rulings of the state courts, District Court or Court of Appeals, and fails to present the positions of the parties in the lower courts -- the parties' positions, especially the concessions of the State, had a direct effect on the rulings of the Eleventh Circuit Court of Appeals. The Respondent attempts herein to summarize the facts, outline the parties' positions and the actual rulings below, and discuss what is actually at issue in this case.

a. The State Court Post-Conviction Proceedings

In 1980, Respondent "sought post conviction relief under Florida Rules of Criminal Procedure 3.850 ..." Meeks v. Dugger, 576 So. 2d 713, 715 (Fla. 1991). The trial court summarily denied relief. Id. The Florida Supreme Court reversed and "remanded for an evidentiary hearing on the issue of ineffective assistance of

counsel during the sentencing phase of the trial." Meeks, 576 So. 2d at 715. See also Petition for Writ of Certiorari, Singletary v. Meeks (hereinafter "Petition"), p. 10 ("[T]he Florida Supreme Court ... remanded the cause for an evidentiary hearing on the issue of ineffective assistance of trial counsel during the sentencing phase of [one of the two trials involved in this case].")

Respondent Meeks had filed lengthy pleadings providing extensive factual allegations addressing the ineffective assistance afforded by his court-appointed counsel pretrial, at trial, at capital sentencing and on appeal. At the hearing held pursuant to the Florida Supreme Court's ruling, the state trial judge excluded evidence relating to counsel's pretrial and trial deficiencies; moreover, notwithstanding the Florida Supreme Court's ruling that a hearing should be held on ineffective assistance of counsel "during the sentencing phase of the trial," Meeks, 576 So. 2d at 715, the state trial judge excluded evidence proffered by Mr. Meeks relating to counsel's ineffective assistance at capital sentencing (See e.g., P.C. 36-38, 44, 87, 102, 228, 304, 314, 387, 404).[1]

Thus, Petitioner proffered evidence and witnesses, but the state trial court declined to admit the evidence or testimony (See Initial Brief of Appellant, Meeks v. Dugger/Singletary, United States Court of Appeals for the Eleventh Circuit, pp. 82-88 [outlining the deficiencies in the state trial court's treatment of the post conviction petition]). Mr. Meeks, who is indigent, also

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[1]"P.C." refers to the record of the post-conviction proceedings in the state trial court.

proffered that additional witnesses and evidence would have been presented, but that the witnesses and evidence could not be produced due to the state trial court's failure to afford subpoenas and process (See, e.g., P.C. 2-4, 6-9, 28; see also Eleventh Circuit Initial Brief of Appellant, pp. 82-88).

The state trial court expressly excluded testimony proffered by Respondent Meeks relating to counsel's ineffective assistance at trial (P.C. 16-67, 78-92, 94-106, 286-314, 387, 404), including evidence relating to counsel's failure to move for a change of venue in light of the pervasive pretrial publicity and demonstrable atmosphere of racial animus against Mr. Meeks in the County in which he was tried (see discussion infra); counsel's failure to conduct adequate voir dire; counsel's inadequate preparation and investigation for trial; counsel's failure to challenge the prosecution's case; counsel's failure to cross-examine the State's witnesses; counsel's failure to present the defense adequately; counsel's failure to call available defense witnesses; counsel's failure to investigate forensic evidence; counsel's failure to utilize pretrial discovery; counsel's failure to object to constitutional error; counsel's failure to provide a minimally reasonable closing argument; and counsel's woefully inadequate assistance on direct appeal.[2]

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[2]The Attorney General's petition presents no discussion whatsoever addressing the specific allegations presented by Mr. Meeks in support of his claims of ineffective assistance of counsel. This omission may be based on the Attorney General's assumption that the actual allegations are not relevant to the certiorari question presented. Given the Attorney General's (continued...)

And notwithstanding the state supreme court's ruling "remand[ing] the cause for an evidentiary hearing on the issue of ineffective assistance of trial counsel during the sentencing phase of the trial," Meeks, 576 So. 2d at 716, the state trial court excluded testimony and evidence relating to counsel's failure to investigate mitigating evidence; counsel's failure to present mitigating evidence; counsel's failure to challenge the aggravators asserted by the State; counsel's failure to object to constitutional error; and counsel's failure to provide a professionally appropriate closing argument at sentencing (P.C. 355-79; see also id. at 16-67, 78-92, 94-106, 286-314, 387, 404).

The trial court appointed the same attorney for purposes of appeal in both cases. Counsel filed a 10 page brief with five (5) pages of legal argument in one case (Case 299). Counsel raised seven "points" in those five pages. The points raised can only be characterized as incomprehensible -- as point VI, for example, counsel raised the sentencing judge's failure to poll the jury, a claim he himself had expressly waived in the trial court (See generally, Initial Brief of Appellant, United States Court of Appeals for the Eleventh Circuit, p. 62 [discussing counsel's

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[2](...continued)
presentation, Respondent will summarize, rather than specifically detail all of the facts presented in support of his claims of ineffective assistance of counsel. The facts submitted on Mr. Meeks' behalf, including affidavit and other documentary proffers, comprise hundreds of pages of submissions to the state courts, District Court and Court of Appeals. The summary outlined in this section of Mr. Meeks' response, and in sections b, c, and d, infra, demonstrates the substantiality of the facts submitted in support of Mr. Meeks' claim.

ineffectiveness on appeal]). In Case 300, counsel filed a 9 page brief containing four (4) pages of legal argument. Two "points" were raised: 1) a strange "corpus delicti" "point" -- arguing that the State had not established "corpus delicti" for "facts" which were not even at issue at the trial (four of the seven "points" raised in Case 299 involved this same type of "point"); 2) the "jury poll" issue which, as in Case 299, counsel had himself waived below.

Mr. Meeks submitted similar proffers addressing counsel's ineffectiveness to the state and federal courts. Cf. Petition for Writ of Certiorari, pp. 21-22 (conceding that the "same facts" were proffered to the state and federal courts). As discussed below, in consideration of the state court's failures to resolve the issues, especially the issues of ineffective assistance of counsel at trial and on appeal, cf. Meeks, 576 So. 2d at 716 ("the cause [was remanded] for an evidentiary hearing on the issue of ineffective assistance ... during the sentencing phase of the trial..."), and since Mr. Meeks had submitted facts "that, if proved at the hearing, would entitle petitioner to relief," Meeks v. Singletary, 963 F.2d 316, 319 (11th Cir. 1992), the Eleventh Circuit Court of Appeals found that a hearing on the issues of ineffective assistance of counsel at trial and on appeal was warranted. Meeks, 963 F.2d at 319-20.

This case involved two separate prosecutions. Respondent Meeks proffered evidence (based on counsel's own disclosures) to the District Court, evidence Mr. Meeks had tried to present to the

state courts, that counsel spent a grand total of seven (7) hours preparing for both cases, including the time spent interviewing Mr. Meeks (See Initial Brief of Appellant, United States Court of Appeals for the Eleventh Circuit, Meeks v. Dugger/Singletary, p. 72, citing District Court Record Vol. I, Doc. 3, p. 6 and Vol. I, Doc. 4, p. 5). Counsel failed to meet with Mr. Meeks at all between the two trials (Id. at R. Vol. I, Doc. 12, App. A).

Douglas Meeks is borderline mentally retarded. After the jury reached a guilty verdict in one case, the court asked counsel, "Do you have any testimony to present?" (R., Case 299, p. 483). Counsel responded: "No, Your Honor, not that I know of right now, not until I talk to my client...I don't know of any witnesses" (R., Case 299, p. 403). Counsel asked for "minutes" to prepare (Id.). After a ten minute recess (id. at 414), counsel presented no mitigation and no challenge to the prosecution's alleged aggravation. His closing argument comprised less than two record pages. After being instructed to consider only Florida's then-statutorily enumerated mitigating factors, the jury returned a recommendation of death (R. Case 299, p. 442) which was imposed immediately thereafter (R. Case 299, p. 444).

Counsel had again not prepared by the time of the sentencing phase in the second trial. He presented no mitigating evidence and no challenge to the aggravators asserted by the prosecution. His closing argument again encompassed less than two record pages. After being instructed to consider only statutorily enumerated mitigating factors, the jury recommended death (R. Case 300, pp.

320, 322) and the trial court immediately imposed that sentence (Id. at 329).

Not only did the state courts fail to resolve the issues relating to counsel's ineffective assistance at trial and on appeal, see Meeks, 963 F.2d at 319-20, they also failed to make findings addressing the substantial deficiencies of counsel at the capital sentencing proceedings. See id. at 319-20. The state supreme court itself has now recognized that issues relating to deficiencies in the sentencing proceeding have not been resolved, ruling in its most recent opinion that Mr. Meeks should be afforded an evidentiary hearing, in part, because of counsel's affidavit attesting that he "failed to investigate, develop, and present available nonstatutory mitigating evidence regarding Meeks' character and background, and his emotional, intellectual, and psychological deficiencies." Meeks, 576 So. 2d at 716.

b. The Rulings of the State Courts

The state post-conviction trial court excluded evidence relating to counsel's ineffective assistance at trial and on appeal and much of the evidence relating to counsel's ineffectiveness at capital sentencing. Then, the state post-conviction "trial court never made any fact findings pertaining to petitioner's claims of ineffective assistance at trial and on appeal." Meeks v. Singletary, 963 F.2d 316, 319 (11th Cir. 1992). As the Florida Supreme Court itself subsequently acknowledged, this case is devoid of state court evidentiary resolution of Mr. Meeks' claims of ineffective assistance of counsel at trial and on appeal: "[W]e ...

remanded the cause for an evidentiary hearing on the issue of ineffective assistance of trial counsel during the sentencing phase of the trial." Meeks, 576 So. 2d at 716 (citation omitted).

The Florida Supreme Court itself also failed to make findings of fact. Notwithstanding Mr. Meeks' submissions, the state supreme court said absolutely nothing about most of the allegations of ineffectiveness presented by Respondent Meeks. "The Florida Supreme Court's opinion affirming the rule 3.850 [post-conviction trial] court contains at most one passage that conceivably could be interpreted as a fact finding." Meeks, 963 F.2d at 319. The Court of Appeals quoted the Florida Supreme Court's summary passage:

> We find this record [the trial transcript? the rule 3.850 petition? the rule 3.850 hearing?] does not establish any identifiable deficiencies in [Meeks'] trial counsel's voir dire examination; nor do we find his asserted failure to ask for additional peremptory challenges an erroneous omission by counsel necessitating a conclusion of ineffectiveness.

Meeks, 963 F.2d at 319 n.4 (bracketed questions included in the Court of Appeals' opinion), discussing Meeks v. State, 418 So. 2d 987, 988 (Fla. 1982). The Court of Appeals also noted that when Mr. Meeks sought state court resolution of the claim of ineffective assistance of counsel on appeal in 1991, the state supreme court rejected the claim "summarily, and without any fact findings." Meeks, 963 F.2d at 319, discussing Meeks v. Dugger, 576 So. 2d 713, 716 n.3 (Fla. 1991).

The state courts thus failed to resolve Mr. Meeks' claims of ineffective assistance of counsel at trial and on appeal. The limited hearing conducted in the state courts did not resolve the

issues, and the state courts made no findings of fact rebutting these claims. See Meeks v. Singletary, 963 F.2d at 319 (discussing the state courts' rulings). Accordingly, because Mr. Meeks alleged facts which entitled him to relief, because of the lack of state court evidentiary resolution and because the dearth of state court findings made 28 U.S.C. section 2254(d) inapplicable to this case, the Eleventh Circuit Court of Appeals held "that petitioner [Meeks] is entitled to an evidentiary hearing on his claims of ineffective assistance of counsel at trial and on appeal." Meeks, 963 F.2d at 319-20.

As to counsel's shortcomings at capital sentencing, the Florida Supreme Court itself has now acknowledged that there were inadequacies in the prior resolution. Thus, relying on former defense counsel's affidavit "wherein the attorney stated that he felt constrained by the language of the statute" and that because he was "restricted by the then prevailing statutory construction [defense counsel] failed to investigate, develop, and present available nonstatutory mitigating evidence regarding Meeks' character and background, and his emotional, intellectual, and psychological deficiencies," Meeks v. Dugger, 576 So. 2d at 716, the Florida Supreme Court held in 1991 that Mr. Meeks was entitled to an evidentiary hearing on the issue of whether the sentencing errors were harmless. Id. at 716.

The state supreme court's decision, addressing counsel's sentencing shortcomings in the context of Respondent Meeks' Hitchcock v. Dugger, 481 U.S. 393 (1987), claim, also noted that

Mr. Meeks submitted "substantial nonstatutory mitigating" evidence which the sentencers should have been allowed to consider. Meeks, 576 So. 2d at 716. Mental health evidence "suggest[ed] several mitigating circumstances: that Meeks is easily led, suffers from a plethora of mental problems, has difficulty with abstraction and concept formation, comes from a background of poverty and deprivation..." Id. at 716. Mitigating evidence independent of the mental health evaluations was provided by the affidavits "of two of his sisters and his mother, chronicling his underprivileged childhood." Id. The state supreme court also explained that the "substantial" mitigation which "could have been presented" included "the fact that he had received ... treatment with psychotropic medication, that he had a history of drug and alcohol abuse, and that he suffered from severe emotional problems..." Meeks, 576 So. 2d at 716. The state supreme court relied on these submissions and remanded for an evidentiary hearing. Meeks, 576 So. 2d at 716.

After conceding sentencing error in the Florida Supreme Court, see Meeks, 576 So. 2d at 716, the Florida Attorney General did not seek certiorari review of the state supreme court's ruling remanding for an evidentiary hearing on the capital sentencing deficiencies. The "proceedings in the state trial court [were then] held in abeyance pending [the Court of Appeals'] disposition of [the] appeal [in the Eleventh Circuit]." Meeks, 963 F.2d at 317.

This record thus establishes that there are neither state court findings on nor a reliable state court resolution of Mr.

Meeks' claims of ineffective assistance of counsel at trial and on appeal. See Meeks v. Singletary, 963 F.2d at 319-20 (discussing the state courts' rulings). As to deficiencies of counsel at sentencing, the Florida Supreme Court itself has now acknowledged that evidentiary resolution is necessary. Meeks v. Dugger, 576 So. .2d at 716.

In light of the original trial record; the parties' positions; Respondent Meeks' allegations concerning counsel's deficiencies at trial, sentencing and on appeal; and the history of this case in prior state court post-conviction proceedings, the current rulings of the Eleventh Circuit Court of Appeals and Florida Supreme Court that evidentiary hearings are necessary were eminently reasonable. Immediately above, Respondent outlined the history of the state court post-conviction proceedings and the state court rulings. Immediately below, he outlines the record of what transpired at trial, sentencing and on appeal, a record which demonstrates significant deficiencies in counsel's performance. Thereafter, Respondent discusses the positions of the parties, particularly the concessions and waivers which the State Attorney General made in the lower courts, waivers which are directly relevant to the ruling of the Court of Appeals.

c. The Trial and Sentencing

Douglas Ray Meeks' 1975 sentences of death resulted from "one of the first death cases tried under the newly approved [Florida] death sentence procedures." Meeks v. State, 418 So. 2d 987 (Fla.

1982).[3] At those proceedings, Mr. Meeks, a black man, was charged in rural North Florida with two homicides of local white citizens. The State elected to try the charges separately (in case numbers 74-299-CF [hereinafter "299"] and 74-300-CF [hereinafter "300"].) Mr. Meeks was represented by the same defense counsel at both trials, on direct appeal in both cases, and at a Gardner v. Florida, 430 U.S. 349 (1977) hearing subsequently ordered sua sponte by the Florida Supreme Court.

In case number 299 (the "Walker case") the entire venire, but for a single member, had knowledge of the case, either through the newspapers, the radio, from conversations with witnesses and relatives of the victim, or through "street talk" (See, e.g., ROA, Case 299, pp. 14, 28, 35, 48, 56, 67, 68, 69, 70, 71, 72, 74, 83, 98, 99). Despite the widespread publicity the case had received, defense counsel neither requested a change of venue nor made any

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[3]Respondent notes that no undue delay in the litigation of this case can be ascribed to Mr. Meeks. Indeed, the State never asserted that Mr. Meeks is responsible for any delay in its arguments to the District Court or Court of Appeals. The Florida Supreme Court took three years to complete the direct appeal process; the habeas corpus decision reported at Meeks v. Dugger, 576 So. 2d 713 (Fla. 1991), was issued four years after the Eleventh Circuit Court of Appeals allowed Mr. Meeks leave to seek review in the state supreme court, Meeks v. Dugger, No. 87-3281 (11th Cir. Nov., 1987), cited in Meeks v. Dugger, 576 So. 2d at 716; the state courts took three years to rule on the post-conviction petition filed under Fla. R. Crim. P. 3.850; and the District Court took three years to rule on the federal habeas petition and an additional year to rule on Mr. Meeks' motion for rehearing. All of Mr. Meeks' pleadings were timely filed. The assertion presented for the first time in the certiorari petition (that, without citation to the record or to any supporting fact, this case is an example of "delay," see Petition at 21) does not hold up on this record. The assertion is especially inappropriate in light of the current ruling of the Florida Supreme Court itself that an evidentiary hearing is necessary.

attempt to reveal and/or explore the effects of the publicity and personal knowledge on the jurors' views.

Racial animus had also infected the citizenry and local jurors in this small North Florida town; defense counsel, however, undertook no effort to explore this issue, inquire as to jurors' attitudes, or seek a change of venue. The jurors in the jury pool, and the trial jurors, were all white.

No physical evidence connecting Meeks to the offense was introduced at the trial of Case 299. There was no fingerprint, hair or other forensic evidence connecting Mr. Meeks to the offense and there was no evidence of a confession or admission by Mr. Meeks. Among the witnesses for the State were three local citizens who testified that they had seen two "black boys" in the area of the convenience store near the time the crime was alleged to have occurred (see ROA, Case 299, pp 174, 189, 210). However, these witnesses could not identify either of the men they saw as Douglas Ray Meeks. These witnesses said they were testifying because "black boys" were rarely, if ever, seen in that area of Perry, Florida (ROA, Case 299, pp. 174, 191). One witness identified one of the "black boys" as Homer Hardwick, the codefendant (ROA, Case 299, p. 190), but could not identify Mr. Meeks as one of the "black boys."

The State also introduced the testimony of Diane Allen, a clerk in the convenience store, who was shot by one of the assailants. Although she could not identify Mr. Meeks nor describe the assailants on the day after the offense, she testified that she

was able to identify Mr. Meeks at law enforcement's suggestion during a lineup conducted a month or so later (ROA, Case 299, pp. 141-42). She stated that the basis of her identification was the "man's eyes" (ROA, Case 299, pp. 151, 153). She was, however, unable to describe the man at trial and testified that she was unable to describe him when she spoke to the police after the offense. Another witness confirmed that Ms. Allen was "hysterical" immediately after the robbery (ROA, Case 299, p. 177) and that she could not tell the police who was involved or who fired the shots.

Much of the trial testimony introduced by the State had to do with the identification of Homer Hardwick, Mr. Meeks' alleged accomplice. Local citizens testified that Hardwick was one of the "black boys" near the store, although they could not identify Mr. Meeks. Diane Allen testified that Hardwick was one of the assailants, that she knew Hardwick from high school, and that she had identified his picture in a high school annual shortly after the incident (ROA, Case 299, p. 137-38, 224). A mutual friend of both Hardwick and Mr. Meeks testified that he had seen Mr. Meeks and Mr. Hardwick together not near the store but at a football game on the day of the offense (ROA, Case 299, P. 216).

Testimony regarding a fingerprint which was found at the convenience store and identified as Hardwick's was then admitted (ROA, Case 299, pp. 246, 251-54). The same evidence was successfully suppressed on defense motion at Hardwick's separate trial. No such motion was made by defense counsel on Mr. Meeks' behalf.

The jury was concerned about Hardwick's involvement. They interrupted their deliberations to ask the Court why he had not appeared to testify (ROA, Case 299, p. 391), and the Court informed them that Hardwick was under indictment for the same offense and therefore could not be compelled to testify (ROA, Case 299, p. 395).

Defense counsel presented no evidence. He then provided a brief, general closing argument. The jury returned a verdict of guilty (ROA, Case 299, p. 397). The sentencing phase of the trial commenced immediately thereafter (ROA, Case 299, p. 402). Defense counsel requested a few "minutes" to confer with his borderline retarded client[4] (ROA, Case 299, p. 403), to find out from Mr. Meeks whether Mr. Meeks had any evidence to "put on" at sentencing (ROA, Case 299, p. 403). The sentencing proceedings commenced after a ten minute recess (ROA, Case 299, p. 414). Defense counsel did not present available mitigating evidence, cf. Meeks, 576 So. 2d at 716 (outlining the "substantial" mitigation available), presented no challenges to the State's alleged aggravators and provided a closing argument of less than two record pages telling the jury that the sentencing decision was up to them. The jury was instructed that their consideration was restricted only to statutorily enumerated mitigating circumstances. The jury then returned a verdict of death (ROA, Case 299, p. 442).

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[4]Counsel did not develop or present evidence about Mr. Meeks' impairments. The state supreme court has ordered a hearing, in part, because evidence of Mr. Meeks' impairments was not heard by the jury. Meeks, 576 So.2d at 716.

In Case 300 (the "Thompson case") the charge again was killing "unlawfully and while engaged in the perpetration of a felony" (ROA, Case 300, p. 6). As in the previous trial, the entire venire was white. Almost the entire venire was also acquainted with the case (See, e.g., ROA, Case 300, pp. 8, 13, 21, 25, 27, 30, 32, 34, 38, 41, 42, 43, 46, 48, 49, 51, 53, 54, 62, 66). And, as demonstrated by evidence proffered post-conviction to the state and federal courts, racial animus infected the views of these white North Florida jurors.

Defense counsel, however, again made no attempt to inquire as to the extent of the publicity, which by now reflected Mr. Meeks' conviction and death sentence in the prior case, and no effort to inquire into the jurors' views. No motion for change of venue was filed.

Among the witnesses introduced by the State were three male white high school students who had seen a black man coming out of the store as they pulled up, after which they went in and discovered the clerk bleeding on the floor (ROA, Case 300, pp. 84-87, 104-106, 124-125). Mr. Meeks was placed in a lineup shortly after the incident, but the students could not identify him as the man they saw leaving the store (ROA, Case 300, pp. 92, 109). The State also introduced the testimony of Ohio Tensley, an acquaintance of Mr. Meeks, who testified that he believed Mr. Meeks "did it" (ROA, Case 300, p. 186), but also that Mr. Meeks never said that he "did it" and that after "being teased" Mr. Meeks said that "he don't do things like that" (ROA, Case 300, p. 189).

Defense counsel made no effort to cross-examine Tensley as to his bias and interest, association with the State, or favors provided in exchange for his testimony.

Homer Hardwick, the co-defendant in the prior case (Case 299), then took the stand as a State's witness and testified that he believed Mr. Meeks was involved (ROA, Case 300, pp. 192). Counsel did not cross-examine Hardwick on bias and interest, or on what he expected to gain from his testimony. Hardwick, who was not involved in Case 300, testified that he believed the decedent was killed when he reached for a phone. The State's other witnesses, however, testified that there was no telephone in the store (ROA, Case 300, pp. 88, 107), no other witness was able to testify that there was a phone, and the prosecutor conceded that the evidence showed that there was no telephone in the store (ROA, Case 300, p. 250).

Finally, the State presented a witness who testified that in his opinion two fingerprints found in the store matched Mr. Meeks'. Given the invalidity of the witness' testimony, similar evidence was excluded from the prior Hardwick trial on the motion of Mr. Hardwick's counsel (see supra). Mr. Meeks' counsel made no effort to exclude the testimony. According to this witness, the number of points of comparison necessary for him to "match" fingerprints was "basically just what [I] feel is enough for a positive i.d." (ROA, Case 300, p. 165). Counsel not only did not move to exclude this evidence, he made no effort to develop or present forensic or expert evidence demonstrating that such a procedure does not allow

for a reliable identification; nor did counsel cross-examine the witness as to his bias, interest or the inadequacies of his procedures.

Mr. Meeks testified that he had not been present at the store on the date of the incident (ROA, Case 300, pp. 199-205), and identified three witnesses who knew he was at another location. These witnesses were subsequently called and their testimony supported the testimony of Mr. Meeks (ROA, Case 300, pp. 211-22). Defense counsel, however, failed to call other available witnesses who would have confirmed the defense. He then provided a weak closing argument which failed to identify the inadequacies in the State's case or reasonably present the facts establishing Mr. Meeks' innocence.

The sentencing phase in Case 300 began immediately after the jury returned its guilty verdict (ROA, Case 300, p. 292). At the sentencing hearing, the State introduced the indictment in Case number 299 (ROA, Case 300, p. 303), and argued that since "one jury has sentenced him to death, that is a circumstance you should consider." Id. at 309. Defense counsel presented no mitigating evidence, see Meeks, 576 So. 2d at 716 (outlining the "substantial" mitigation which was available and could have been introduced), and no challenges to the State's alleged aggravation (ROA, Case 300, p. 304). Counsel's argument in this case also encompassed less than two record pages. The jurors were instructed that they could only consider mitigating circumstances listed in the capital sentencing

statute and they returned a verdict of death (ROA, Case 300, pp. 320, 322).

The trial court imposed death sentences in each case employing sentencing orders which, like the prosecutor's argument, "doubled" aggravating circumstances and applied them overbroadly. The same trial attorney was appointed for purposes of appeal in each case.

Counsel filed a 10 page brief with 5 pages of legal argument in case number 299, and a 9 page brief with 4 pages of legal argument in case number 300. The Florida Supreme Court affirmed. Although counsel had not presented the issue, on May 6, 1977, the Florida Supreme Court sua sponte remanded Case 299 for an inquiry under Gardner v. Florida, 430 U.S. 349 (1977). Thereafter, the trial court and Florida Supreme Court reaffirmed the death sentence. Meeks v. State, 364 So. 2d 461 (Fla. 1978).

Mr. Meeks then filed the petitions for post-conviction relief outlined in sections a and b, supra. In 1991, the Florida Supreme Court reviewed counsel's affidavit discussing his failure to develop and present nonstatutory mitigation. Meeks, 576 So. 2d at 716. The court also reviewed the "substantial" mitigating evidence which "could have been presented." Id. The prior hearing had not resolved the issue and the Florida Supreme Court concluded that an evidentiary hearing was appropriate. Id., cited and discussed by the Eleventh Circuit Court of Appeals at Meeks v. Singletary, 963 F.2d 316, 317, 319 (11th Cir. 1992).

d. The State's Position In The Lower Courts

In the most recent state court proceedings, the Attorney General conceded that the record established constitutional error in the capital sentencing proceedings, but argued that the error should be deemed harmless. Meeks v. Dugger, 576 So. 2d at 716. The Florida Supreme Court declined to find the error harmless and remanded for an evidentiary hearing in the trial court in light of former counsel's affidavit explaining that he "failed to investigate, develop, and present available nonstatutory mitigating evidence regarding Meeks' character and background, and his emotional, intellectual, and psychological deficiencies." Meeks, 576 So. 2d at 716.

When Mr. Meeks' case was before the District Court, the State never argued that any facet of the claim of ineffective assistance of counsel at trial, sentencing or on appeal was subject to a procedural default or lack of exhaustion defense. Rather, the State argued on the merits that Mr. Meeks should be denied relief.

In its brief to the Court of Appeals and then at oral argument in that Court, the State's argument was again radically different from the argument presented by the State in Keeney v. Tamayo-Reyes, 112 S.Ct. 1715 (1992): the Florida Attorney General asserted neither an exhaustion nor a procedural default defense as to Mr. Meeks' claims of ineffective assistance of counsel and identified no aspect of the claims which was either unexhausted in or procedurally barred by the state courts.

Petitioner submitted to the federal courts valid claims of ineffective assistance of counsel and requested evidentiary resolution. The state courts had not afforded Mr. Meeks resolution and made no findings rebutting the claim. The State did not argue either lack of exhaustion or procedural default in the District Court or Court of Appeals. The Court of Appeals found that evidentiary resolution was appropriate.

ARGUMENT IN RESPONSE

As the outline presented above demonstrates, Mr. Meeks presented to the state courts and then to the District Court and Eleventh Circuit Court of Appeals valid claims of ineffective assistance of counsel. The State never asserted a lack of exhaustion or procedural defense in the District Court or in its briefs and oral argument in the Court of Appeals. The State conceded in the lower courts that Mr. Meeks' claims of ineffective assistance of counsel were before those courts on their merits. Neither in the lower courts nor in its current petition has the State identified what aspect of Mr. Meeks' case was unexhausted in or procedurally barred by the state courts. Cf. Petition, pp. 21-22 (conceding that the "same facts" were proffered to the state and federal courts).

When Mr. Meeks filed his state court petition asserting that defense counsel rendered ineffective assistance at trial, sentencing and on appeal, the state supreme court "remanded for an evidentiary hearing on the issue of ineffective assistance of counsel during the sentencing phase of the trial." Meeks v.

Dugger, 576 So.2d 713, 715 (Fla. 1991). See also Petition for Writ of Certiorari, p. 10 ("[T]he Florida Supreme Court ... remanded for an evidentiary hearing on the issue of ineffective assistance of trial counsel during the sentencing phase of [one of the trials].") Although Mr. Meeks presented claims sufficient to demonstrate his entitlement to relief, see Meeks v. Singletary, 963 F.2d 316, 319-20 (11th Cir. 1992); see also Statement of the Case, supra (outlining the claims), the state courts afforded neither needed evidentiary resolution nor findings on the claims of ineffective assistance of counsel at trial and on appeal. Meeks, 963 F.2d at 319-20; Statement of the Case, supra (discussing the state courts' rulings). The Court of Appeals concluded that a hearing on the claims of ineffective assistance at trial and on appeal was necessary. Meeks, 963 F.2d at 319-20.

The Florida Supreme Court has also now recognized that the limited hearing conducted in the state trial court did not resolve some of the relevant issues. Thus, in Meeks v. Dugger, relying on counsel's affidavit which explained that counsel "failed to investigate, develop, and present available nonstatutory mitigating evidence regarding Meeks' character and background, and his emotional, intellectual, and psychological deficiencies," id., 576 So. 2d at 716, the state supreme court has itself now remanded for an evidentiary hearing. Id. at 716.[5]

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[5]The State did not seek certiorari review of the Florida Supreme Court's decision.

Respondent discusses below the propriety of the rulings of the Court of Appeals and the fact that, notwithstanding its general assertions that the Court of Appeals' decision is in conflict with Keeney v. Tamayo-Reyes, neither a substantial question nor a conflict warranting review are presented by the State's petition. Respondent then discusses those aspects of the Court of Appeals' ruling which are unaffected by the State's petition and the propriety of the ruling of the Court of Appeals in light of the record in this case.

(I)

As outlined in the Statement of the Case portion of this response, Mr. Meeks pled claims of ineffective assistance of counsel demonstrating that he was "entitle[d] ... to relief." Meeks, 963 F.2d at 319. The state courts did not afford evidentiary resolution or findings on the claims of ineffective assistance on appeal and at trial. See Meeks, 963 F.2d at 319-20; Meeks, 576 So. 2d at 715 ("[W]e ... remanded the cause for an evidentiary hearing on the issue of ineffective assistance of trial counsel during the sentencing phase of the trial.") The State asserted neither an exhaustion nor a procedural default defense in the District Court or Court of Appeals. The State's current petition still refers to no allegation proffered to the federal courts in support of Mr. Meeks' claims which was not also proffered to the state courts.

The State, however, broadly asserts that the decision of the Court of Appeals is in conflict with Keeney v. Tamayo-Reyes, 112

S.Ct. 1715 (1992). In Tamayo-Reyes, the State asserted that the habeas petitioner was in procedural default on certain aspects of his claims due to his failure to present evidence on those issues to the state courts. In Mr. Meeks' case, on the other hand, the State did not argue that the claims of ineffective assistance of counsel were not properly before the federal courts, nor that any aspect of the claims were unexhausted or procedurally barred, nor that any aspect of the claims should not be entertained. Thus, the State here not only addressed the merits of the ineffective assistance of counsel issues, but also consistently asserted, as to the additional substantive claims raised by Mr. Meeks, that "If relief is merited...appellant will have to convince this court that he was subjected to ineffective assistance of counsel...." See Brief of Respondent/Appellee, United States Court of Appeals for the Eleventh Circuit, Meeks v. Dugger/Singletary, p. 17. See also id. at 25 ("If Meeks is entitled to relief it will be because counsel was ineffective under the standard of Strickland v. Washington[, 466 U.S. 668, 104 S.Ct. 2054 (1984)] ..."); id. at 26 (claim of improper application of aggravators should be considered in the context of ineffective assistance of counsel). Given the consistent absence of any exhaustion or procedural default assertion in the State's submissions, the Court of Appeals cogently distinguished Mr. Meeks' case from Keeney v. Tamayo-Reyes: "[T]he State ... has waived the defense that petitioner may not present to the district court any instances of alleged ineffectiveness not raised in state court." Meeks v. Singletary, 963 F.2d at 320 n.5.

The State's submissions expressly limited their arguments to the contention that Mr. Meeks should not be afforded relief on the merits of the allegations of ineffective assistance of counsel. Indeed, not once in the District Court or Court of Appeals did the State allege that the claims presented by Mr. Meeks to the federal courts were in any way different than the claims Mr. Meeks had presented to the state courts. See also Petition at 21-22 ("same facts" proffered to state and federal courts).

The State's position is especially significant in light of the law of the Eleventh Circuit Court of Appeals: Eleventh Circuit law has long put the State on notice that the failure to assert a procedural default or lack of exhaustion defense in the District Court shall be deemed a waiver of such defenses in the Court of Appeals. See Boykins v. Wainwright, 737 F.2d 1539, 1545 (11th Cir. 1984) ("The State's failure to raise either the exhaustion or procedural default arguments in the district court bars it from prevailing on those claims in the Court of Appeals."); Washington v. Watkins, 655 F.2d 1346, 1368 (5th Cir. 1981) (procedural bar); Hopkins v. Jarvis, 648 F.2d 981, 983 n.2 (5th Cir. 1981) (exhaustion); LaRoche v. Wainwright, 599 F.2d 722, 724 (5th Cir. 1979) (procedural bar); Messelt v. Alabama, 595 F.2d 247, 250-51 (5th Cir. 1979) (exhaustion); West v. Louisiana, 478 F.2d 1026, 1034-35 (5th Cir. 1973) (exhaustion); Grooms v. Wainwright, 610 F.2d 344, 347 (5th Cir. 1980) (where the State does not argue that the district court should not reach the merits, the State waives procedural defenses, including lack of exhaustion, for purposes of

appeal); Thompson v. Wainwright, 714 F.2d 1495 (11th Cir. 1983) (state may waive lack of exhaustion claim); Francis v. Dugger, 908 F.2d 696, 705 n.2 (11th Cir. 1990) ("The State argues that Francis' Maynard claims are totally unexhausted as well as procedurally barred. We do not address these contentions because the State did not raise them before the district court.")

As it did in the District Court, the State agreed in the Court of Appeals that the claims of ineffective assistance of counsel -- including the claims of ineffectiveness at trial and on appeal on which the Court of Appeals ruled that an evidentiary hearing is necessary, Meeks, 963 F.2d at 319-20, and claims relating to the sentencing deficiencies on which the Florida Supreme Court itself has now found an evidentiary hearing necessary, Meeks, 576 So. 2d at 716 -- were appropriately before the federal courts. In the District Court and then in the Court of Appeals, the State litigated the claims on their merits and never argued that any of Mr. Meeks' submissions were subject to a procedural bar, deliberate bypass, lack of exhaustion or any other procedural defense. It was, in fact, in its rehearing petition in the Eleventh Circuit that the State presented for the first time any of the "Tamayo-Reyes" contentions now asserted as grounds for certiorari review.[6]

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[6]In his response to the rehearing petition in the Court of Appeals, Mr. Meeks outlined the State's consistent waivers of any procedural bar or lack of exhaustion defenses. Mr. Meeks also discussed the fact that not only had no such arguments or defenses been asserted by the State in the District Court or, before the rehearing petition, in the Court of Appeals, but also that the State had consistently asserted that the federal courts should rule, albeit against Mr. Meeks, on the merits of the claims. See (continued...)

Significantly, although citing Keeney v. Tamayo-Reyes, the State's Eleventh Circuit rehearing petition identified no fact, allegation or proffer presented to the federal courts in support of the claims of ineffective assistance which Mr. Meeks failed to provide to the state courts.

Even in its current certiorari petition, the State has not identified any fact, proffer or allegation presented by Mr. Meeks to the federal courts which was not asserted during litigation in the state courts. Neither in its current petition nor in its rehearing petition in the Eleventh Circuit has the State once said what it is that was allegedly not exhausted in the state courts. Neither in its current petition nor in the Eleventh Circuit rehearing petition has the State identified what issue, sub-issue or fact presented in support of the claims of ineffective assistance of counsel is subject to a procedural bar.[7]

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[6](...continued)
Response to Petition for Rehearing, United States Court of Appeals for the Eleventh Circuit, Meeks v. Singletary. The State's certiorari petition does not dispute that the first time it presented the argument now asserted was in the petition for rehearing. See Petition for Writ of Certiorari, pp. 15-16. Eleventh Circuit law holds that rehearing will not be granted on the basis of arguments presented for the first time in a petition for rehearing. The State's petition for en banc review was denied with no member of the Court of Appeals suggesting that the panel's unanimous decision should be reconsidered.

[7]No aspect of the claim of ineffective assistance of counsel on appeal -- which was dismissed on its merits without evidentiary resolution in the state courts -- is subject to a procedural bar. See Meeks, 963 F.2d at 319, citing Meeks, 576 So. 2d at 716 n.3. Given the substance of the claim and the fact that neither a hearing nor findings on the claim were afforded by the state courts, the Court of Appeals found that a hearing was necessary. Id., 963 F.2d at 319-20. As to the claim of ineffective assistance
(continued...)

Notwithstanding the sweeping language in its certiorari petition, the State has yet to say what specific fact or issue it is complaining about. The State's petition, in failing to identify what it is that is unexhausted or procedurally barred, thus presents no real dispute warranting certiorari review under Keeney v. Tamayo-Reyes or on any other basis.

Mr. Meeks' valid claims were not resolved at the limited state court hearing. The Court of Appeals' grant of a hearing is by no means inconsistent with Tamayo-Reyes.

(II)

The State's certiorari petition does not challenge additional aspects of the Eleventh Circuit ruling remanding this case to the District Court. Respondent discusses immediately below those aspects of the Court of Appeals' decision.

In Meeks v. Singletary, 963 F.2d 316 (11th Cir. 1992), the Court of Appeals remanded to the District Court for a ruling on the claims raised by Mr. Meeks. Although Mr. Meeks had raised a number of claims, the District Court addressed only two (ineffective assistance at trial and racially discriminatory application of the death penalty). The District Court did not rule at all on the

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[7](...continued)
at trial, the District Court and Court of Appeals each found, without dispute by the State, that no procedural bar had been applied by the state courts and that the claim was thus before the federal courts unencumbered. See Meeks, 963 F.2d at 318 (quoting district court order). As to claim relating to deficiencies of counsel at sentencing, the Florida Supreme Court itself recently noted that there is no procedural bar, evaluated the merits and found an evidentiary hearing necessary. See Meeks, 576 So. 2d at 715, 716.

claim of ineffective assistance of counsel on appeal. As to the other constitutional claims, the District Court ruled that they had been "abandoned" during the District Court proceedings.

Regarding the latter -- the "abandonment" ruling -- the Court of Appeals reversed and remanded for a ruling on the claims by the District Court, noting:

> We now discuss the district court's grounds for not addressing all but tow of petitioner's claims: abandonment and procedural default. Although the district court acknowledges that petitioner never "formally" abandoned any claims, it cites a letter from petitioner's counsel to the court of December 6, 1985, in support of its conclusion that petitioner, presumably informally, had abandoned all but two claims. Our review of the letter and the transcript of the status hearing has failed to produce any evidence that petitioner abandoned any claims. Certainly, neither the letter nor the transcript of the status conference permits the conclusion that petitioner knowingly, voluntarily, or intentionally abandoned any claims. See Potts v. Zant, 638 F.2d 727, 747-51 (5th Cir. Unit B), cert. denied, 454 U.S. 877, 102 S.Ct. 357, 70 L.Ed.2d 187 (1981); Potts v. Zant, 734 F.2d 526, 528-29 (11th Cir. 1984), cert. denied sub nom. Kemp v. Potts, 475 U.S. 1068, 106 S.Ct. 1386, 89 L.Ed.2d 610 (1986).
>
> First, the December 6 letter simply did not contain the statement the district court ascribed to it. Instead of stating "that only two issues remained to be resolved," the letter remarked that "one of the two primary issues in Mr. Meeks' case is the sufficiency of legal representation at trial, sentencing, and direct appeal." The letter responded to a May 31, 1983, order to show cause why Meeks' petition ought not be granted, and to indicate the time needed for an evidentiary hearing. The letter no-where seeks to narrow the issues before the district court. Instead, it dovetailed the petitioner's November 30 motion for continuance of the evidentiary hearing -- which never materialized -- pending the resolution of the ineffective assistance issue in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which at that time was before the United States Supreme Court.
>
> Likewise, nothing in the transcript of the status hearing as much as hints at abandonment of any claims.

> The district court's correct observation that petitioner's counsel argued only the two claims the court later decided to address on the merits does not support a finding of abandonment. Without belaboring the point, we hold that a finding of abandonment of any claims based on counsel's failure to address all claims at the status hearing in the case, without inquiry or notice by the court, constitutes a "trap for the unwary" we cannot countenance. See Lefkowitz v. Newsome, 420 U.S. 283, 293, 95 S.Ct 886, 891, 43 L.Ed.2d 196 (1975).

Meeks v. Singletary, 963 F.2d at 320. The need for a ruling from the District Court is not affected by anything asserted in the State's petition for writ of certiorari.

Mr. Meeks also raised a substantial claim of ineffective assistance of counsel on appeal. Indeed, as Mr. Meeks' submissions to the Court of Appeals related, and as outlined above (see Statement of the Case, supra), this case involves one of the weakest attorney performances of any capital case reviewed by a federal habeas court. The claim was well-supported by Mr. Meeks' factual allegations (See e.g., Initial Brief of Appellant, United States Court of Appeals for the Eleventh Circuit, pp. 21, 56, 59, 46, 89) (outlining the claim). The State asserted no lack of exhaustion or procedural default defense but addressed only the merits of the claim.

Indeed, in the Court of Appeals, the State also agreed with Mr. Meeks that, as to certain of the claims of legal error raised, "[t]he other method of establishing cause to avoid default is to prove counsel was ineffective [on appeal]." Brief of Respondent/ Appellee at 17; see also id. at 21 ("If relief is merited then ... appellant will have to convince this court that he was subjected to ineffective assistance of counsel ..."); id. at 25 ("If Meeks is

entitled to relief it will be because counsel was ineffective under the standard announced in Strickland v. Washington[, 466 U.S. 668, 104 S.Ct. 2052 (1984)]"); id. at 26 (claim of improper application of aggravators should be considered in context of counsel's ineffectiveness).

The state courts denied relief, without a hearing and without any underlying findings or analysis, on Petitioner's claim of ineffective assistance of counsel on appeal. See, e.g., Meeks v. Dugger, 576 So.2d 713, 716 n.3 (Fla. 1991) ("We deny the claims of ineffective assistance of appellate counsel"); see also Meeks v. Singletary, 963 F.2d at 319 (discussing the lack of resolution or findings in the state courts' summary ruling). The State agreed in the Court of Appeals that the claims of ineffective assistance, including ineffective assistance on appeal, were appropriately before the federal courts.

No hearing has ever been held on the claim of ineffective assistance of counsel on appeal. The claim in this case is a substantial one. The District Court, however, never ruled on the claim. The Court of Appeals thus appropriately concluded:

> Before delving into a discussion of the ineffectiveness claim the district court did discuss, we briefly comment on the ineffectiveness claim it did not. Petitioner raised two distinct claims of ineffective assistance of counsel, one pertaining to his counsel's performance at the guilt and sentencing phases of his two trials, the other relating to that counsel's performance on appeal from petitioner's convictions and sentences. As the State's response had done, the district court's order addressed only the former claim of ineffectiveness. Even the catch-all phrase at the end of the court's order refers solely to trial counsel's errors at trial and makes no reference to errors on appeal: "Having reviewed the complete record and all of petitioner's remaining

> assertions of error by trial counsel, it is the judgment of this Court that no such errors were reasonably likely to have an effect on petitioner's trials sufficient to warrant reversal." On remand, we direct the district court to address petitioner's claim of ineffectiveness of counsel on appeal.

Meeks, 963 F.2d at 318-19. The need for evidentiary resolution and a ruling on this substantial claim is not affected by anything in the State's certiorari petition.

As to Petitioner's claim founded on deficiencies of counsel at sentencing, the State does not dispute that the Florida Supreme Court applied no procedural bar and remanded for an evidentiary hearing. See Meeks, 576 So. 2d at 716; Meeks, 963 F.2d at 317. Mr. Meeks' claim involves, inter alia, former defense counsel's affidavit and other affidavits relating that "counsel did not seek to develop nonstatutory mitigating evidence .... These affidavits assert that substantial nonstatutory mitigating evidence could have been presented..." Meeks, 576 So. 2d at 716. There can be no dispute that the claim is a valid one and warrants an evidentiary hearing, as the Florida Supreme Court itself has recognized.

These aspects of Mr. Meeks' case are unaffected by the State's current certiorari petition. As to Petitioner's claim of ineffective assistance of counsel on appeal, the claim is exhausted, subject to no procedural bar and properly before the federal courts; no hearing has been held on the claim; the District Court did not rule on the claim at all; Mr. Meeks' pled facts amply sufficient to establish his right to relief; and an evidentiary hearing and ruling from the District Court on the claim are necessary. See Meeks, 963 F.2d at 319-20. As to the sentencing

claim, no procedural default exists and the state supreme court itself has now found an evidentiary hearing to be appropriate. Meeks, 576 So. 2d at 716. As to the additional constitutional claims (other than ineffective assistance of counsel at trial), consideration of the claims and an initial ruling from the District Court are necessary, as the Court of Appeals noted in its opinion. See Meeks, 963 F.2d at 320-21.

(III)

The ruling to which the State now objects is the Eleventh Circuit's holding that an evidentiary hearing is necessary on Mr. Meeks' claim of ineffective assistance of counsel at trial. Under the specific facts and circumstances of this case -- including the State's position that the claim was appropriately before the federal courts on its merits, the lack of findings from or needed evidentiary resolution in the limited state courts proceedings (see Statement of the Case, infra), and because Mr. Meeks proffered sufficient facts to warrant relief (see sections b,c, and d, supra) -- the Court of Appeals ruled that a hearing was appropriate. See Meeks, 963 F.2d at 319-20.

The Eleventh Circuit Court of Appeals is quite aware of Keeney v. Tamayo-Reyes and applies it forcefully when circumstances warrant. See Mathis v. Zant, ___ F.2d ___, 6 F.L.W. Fed. C1287 (11th Cir. 1992), cited by the State's petition for writ of certiorari at pp. 25-26. In Mathis, unlike the situation in Mr. Meeks' case, the state courts had afforded the habeas petitioner evidentiary resolution and made findings to which the presumption

of correctness applied (see 28 U.S.C. section 2254 (d)), while the State Respondent argued that additional evidence which the petitioner sought to present to the federal court asserted a "new" claim of ineffective assistance which had not been provided to the state courts. The Eleventh Circuit Court of Appeals therefore remanded for review under Keeney v. Tamayo-Reyes "to determine whether the 'new evidence' constituted an additional new ineffectiveness claim not yet exhausted [in the state courts]." Petition for Writ of Certiorari, p. 26 (providing the State's summary of the Mathis holding).

The Eleventh Circuit Court of Appeals also recognizes that, as in Tamayo-Reyes, it is the State, as the habeas petitioner's party-opponent, which must raise an exhaustion or procedural default defense. The Eleventh Circuit has thus held under Tamayo-Reyes that where the State "never has argued to the district court or to us" that the habeas petitioner failed "to develop the facts in state-court proceedings," the Court will deem the state to have waived such defenses. See Card v. Singletary, No. 88-3729, ___ F.2d ___, slip op. at 8 n.4 (11th Cir. Dec. 28, 1992). Cf. Boykins v. Wainwright, 737 F.2d at 1545 ("The State's failure to raise either the exhaustion or procedural default arguments in the district court bars it from prevailing on those claims in the Court of Appeals.") Given the State's waiver of such defenses in Mr. Meeks' case, the Court of Appeals noted: "[T]he State ... has waived the defense that petitioner may not present to the district

court any instances of alleged ineffectiveness not raised in state court." Meeks, 963 F.2d at 320 n.5.[8]

In Keeney v. Tamayo-Reyes the State affirmatively asserted that Tamayo-Reyes' case was subject to an adequate and independent state procedural bar because he had failed to develop material facts in the state court. This is not the situation in Meeks. In Keeney v. Tamayo-Reyes there was an adequate and independent state bar. No such bar exists or has been cited by the State in Meeks. In Keeney v. Tamayo-Reyes this Court addressed the limited issue of which standard -- "cause and prejudice" or "deliberate/intentional bypass" -- should apply when the habeas petitioner fails to develop a material aspect of a claim in the state courts, see Keeney v. Tamayo-Reyes, 112 S.Ct. 1715, 1717 (1992) ("We granted certiorari to decide whether the deliberate bypass standard is the correct standard for excusing a habeas petitioner's failure to develop a material fact in state court proceedings."), and ultimately adopted the "cause and prejudice" standard. None of this relates to the Court of Appeals' ruling in Mr. Meeks' case, where even today the State does not dispute that the "same facts" (Petition, pp. 21-22) were proffered by Mr. Meeks in the state and federal courts.

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[8]This Court has held "that presentation of additional facts to the district court" does not evade "the exhaustion requirement when the prisoner has presented the substance of his claim to the state courts." Vasquez v. Hillery, 474 U.S. 254, 257-58 (1986); Aldridge v. Dugger, 925 F.2d 1320, 1330 (11th Cir. 1991)(same holding, relying on Vasquez v. Hillery). Here, the State never asserted that any aspect of the claim as presented to the federal courts was subject to either an exhaustion, Vasquez v. Hillery, or procedural default, Keeney v. Tamayo-Reyes, impediment.

Contrary to the Respondent's broad assertions, Tamayo-Reyes itself acknowledged that Townsend v. Sain, 372 U.S. 293 (1963), embodies the law attendant to the availability of evidentiary hearings in federal habeas proceedings. "Townsend v. Sain described categories of cases in which evidentiary hearings would be required." Keeney v. Tamayo-Reyes, 112 S.Ct. at 1720 n.5. Townsend also held that "[i]n all other cases where the material facts are in dispute" the federal courts are authorized to conduct hearings. Blanco v. Singletary, 943 F.2d 1477, 1506 (11th Cir. 1991) (quoting and relying on Townsend v. Sain).

In Blanco, as here, a limited hearing was held in the state court. The District Court and Court of Appeals determined that a further evidentiary hearing in federal court was appropriate to allow for full resolution of the Petitioner's claims, especially because of the dearth of state court findings. The Florida Attorney General's certiorari petition in Blanco, a petition presenting the same "Tamayo-Reyes" argument now raised in Mr. Meeks' case, was recently denied by this Court. See Singletary v. Blanco, 112 S.Ct. 2290 (1992).

As in Blanco, the Court of Appeals relied on the standard of Townsend v. Sain, 372 U.S. 293, 313 (1963), in ruling that an evidentiary hearing is appropriate in Mr. Meeks' case. See Meeks, 963 F.2d at 319. Mr. Meeks' case involved no state court findings subject to the 28 U.S.C. section 2254(d) presumption -- the state courts made none. See Meeks, 963 F.2d at 319 and nn.3 and 4. The issue in Tamayo-Reyes involved the default resulting from the

petitioner's failure to litigate his claim in the state courts. There is neither a procedural default nor a lack of exhaustion issue in Mr. Meeks' case. See Meeks, 963 F.2d at 320 n.5. The state courts neither afforded evidentiary resolution to nor made findings on the claims on which the Court of Appeals found a hearing appropriate. Unlike the situation in Tamayo-Reyes, it is the state courts, not Mr. Meeks, who "negligently failed to take advantage of opportunities" for resolution of the claims. See Keeney v. Tamayo-Reyes, 112 S.Ct. 1715, 1719 (1992). See also Statement of the Case, supra (discussing the state court's failures to resolve the issues).

Mr. Meeks' entitlement to an evidentiary hearing on the claims of ineffective assistance of counsel at trial and on appeal is not subject to dispute under either Townsend v. Sain or Keeney v. Tamayo-Reyes. See Meeks, 963 F.2d at 319-20. His entitlement to a hearing on the capital sentencing deficiencies has now been acknowledged by the Florida Supreme Court itself. Meeks, 576 So. 2d at 716.

CONCLUSION

Notwithstanding its broad language, the State's petition presents neither a substantial nor a debatable question in this case. Respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Carolyn Snurkowski, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050 this 19th day of January, 1993.

Attorney

quash the district court's decision, and remand to the district court with instructions to grant the state's motion to dismiss.

It is so ordered.

SHAW, C.J., and OVERTON, BARKETT and GRIMES, JJ., concur.

KOGAN, J., dissents.

Douglas Ray MEEKS, Petitioner,

v.

Richard L. DUGGER, Respondent.

No. 71947.

Supreme Court of Florida.

April 11, 1991.

Petitioner, who had been convicted in two separate trials of first-degree murder and who had been sentenced to death on each conviction, filed petition for writ of habeas corpus. The Supreme Court held that affidavits filed by defendant's trial counsel indicating that he did not seek to develop nonstatutory mitigating evidence in penalty phase because he was constrained by then prevailing statutory construction, on their face, were sufficient to negate conclusion that *Hitchcock* error was harmless, thus requiring remand for evidentiary hearing to determine whether error was harmless.

Remanded with directions.

Kogan, J., filed specially concurring opinion in which Barkett, J., concurred.

Overton, J., filed dissenting opinion.

1. Because this petition was filed prior to our disposition of *Hall v. State*, 541 So.2d 1125 (Fla. 1989), in which we held that all *Hitchcock* claims should be raised pursuant to Florida

1. Habeas Corpus ⇐751

Affidavits filed by habeas petitioner's trial counsel indicating that he did not seek to develop nonstatutory mitigating evidence in penalty phase of capital murder trial because he was constrained by then prevailing statutory construction, on their face, were sufficient to negate conclusion that *Hitchcock* error, in giving instruction limiting jury to consideration of statutory mitigating circumstances, was harmless, thus requiring remand for evidentiary hearing to determine whether error was harmless.

2. Courts ⇐100(1)

Although habeas corpus petitioner's *Hitchcock* claims challenging limitation of jury to consideration of statutory mitigating circumstances in penalty phase of capital murder trial were later required to be raised by motion for postconviction relief, habeas petition would be considered by Florida Supreme Court, as petition was filed before Supreme Court's decision requiring such claims to be raised on postconviction motion. West's F.S.A. RCrP Rule 3.850.

Larry Helm Spalding, Capital Collateral Representative and Billy H. Nolas, Chief Asst. CCR, Office of the Capital Collateral Representative, Tallahassee, for petitioner.

Robert A. Butterworth, Atty. Gen. and Richard E. Doran, Director, Criminal Appeals, Tallahassee, for respondent.

PER CURIAM.

Douglas Ray Meeks, a Florida prisoner under sentence of death, petitions this Court for a writ of habeas corpus. Meeks seeks relief from two death sentences arising from two separate convenience store murders. He alleges that available nonstatutory mitigating evidence was excluded from his sentencing hearings, and he is therefore entitled to new sentencing proceedings pursuant to *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). We have jurisdiction. Art. V, § 3(b)(1), (9), Fla. Const.[1]

Meeks was indicted for two first-degree murders occurring in separate mini-market robberies in Perry, Florida. The first indictment alleged that Meeks entered a Majic Market convenience store on October 24, 1974, and, while engaged in committing a robbery, mortally stabbed the store clerk, Chevis Thompson. The second indictment alleged that two weeks later, on November 6, 1974, Meeks and Homer Hardwick entered a convenience store and committed an armed robbery in which the store clerk and a customer, Lloyd Walker, were shot. Walker later died of his wounds. The state elected to try Meeks separately for each indictment.

At the penalty phase of both trials, the jurors were instructed to consider only those mitigating circumstances enumerated in section 921.141, Florida Statutes (1975).[2]

Rule of Criminal Procedure 3.850, we will allow the instant claim to be raised in a petition for writ of habeas corpus.

2. The trial judge instructed the jury in the Lloyd Walker murder case as follows:

Members of the jury, upon conviction of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or to life imprisonment, as authorized by Florida Statute section 775.02. The proceedings shall be conducted by the trial judge before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the sentence and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in that particular section of the law. Any such evidence which the court deems to have probative value with respect to the sentencing may be received regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is afforded a fair opportunity to rebut any hearsay statements and further provided that particular portion of the law shall not be construed to authorize introduction of any evidence secured in violation of the Constitution of the United States or of Florida. The state and the defendant, or his counsel, shall be permitted to present arguments for or against sentence of death. After hearing all the evidence, the jury shall deliberate and render an advisory opinion to the court based upon the following matters: (A) Whether sufficient aggravating circumstances exist as enumerated in subsection 6 and (B) whether sufficient mitigating circumstances exist as enumerated in subsection 7 which outweigh the aggravating circumstances found to exist, and (C) based on these considerations, whether the defendant should be sentenced to life imprisonment or death. Notwithstanding the recommendation of the majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes the sentence of death, it shall set forth in writing its findings upon which the sentence of death is based. Aggravating circumstances shall be limited to the following: (A) The capital felony was committed by a person under sentence of imprisonment. (B) The defendant was previously convicted of another capital felony or of a felony involving the use of or threat of violence to the person. (C) The defendant knowingly created a great risk of death to many persons. (D) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of or an attempt to commit or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb. (E) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. (F) The capital felony was committed for pecuniary gain. (G) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. (H) The capital felony was especially heinous, atrocious or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the sufferings of others. Mitigating circumstances shall be the following: (A) The defendant has no significant history of prior criminal activity. (B) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. (C) The victim was a participant in the defendant's conduct or consented to the act. (D) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor. (E) The defendant acted under extreme duress or under the substantial domination of another person. (F) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (G) The age of the defendant at the time of the crime. These are your instructions with respect to your deliberation concerning your recommendation to the court as to whether the court should impose a sentence of life imprisonment or a sentence of death upon the defendant, Douglas Ray Meeks.

The instruction given the jury in the Chevis Thompson murder case was substantially the same as the above.

The jury recommended death in both instances, and the trial court imposed the recommended sentences, referring only to the statutory mitigating circumstances in its orders.

In the Walker case, the trial judge found four aggravating factors, specifically: (1) the murder was committed during the commission of a violent felony; (2) the murder was committed for the purpose of avoiding arrest; (3) the murder was committed for pecuniary gain; and, (4) the murder was committed to hinder the enforcement of laws. The court also found two mitigating circumstances: (1) lack of significant criminal history and (2) Meeks' youthful age and low intelligence. In the Thompson case, the trial judge found the same four aggravating circumstances plus the circumstance that Meeks had been convicted previously of a capital felony (the Walker murder). One mitigating circumstance was found (Meeks' youthful age and low intelligence). Meeks' convictions and sentences of death were affirmed by this Court on direct appeal. *Meeks v. State*, 336 So.2d 1142 (Fla. 1976), and *Meeks v. State*, 339 So.2d 186 (Fla.1976).

Following the United States Supreme Court's decision in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), we ordered the sentencing court to conduct a *Gardner* inquiry to determine whether Meeks' death sentence for the murder of Lloyd Walker was based upon consideration of evidence which was not known to Meeks or which he had no opportunity to explain or deny. The trial judge subsequently stated that his decision was based solely on information known to Meeks, and this Court found no violation of the *Gardner* principle. *Meeks v. State*, 364 So.2d 461 (Fla.), *cert. denied*, 439 U.S. 991, 99 S.Ct. 592, 58 L.Ed.2d 666 (1978).

In 1980, Meeks sought postconviction relief under Florida Rule of Criminal Procedure 3.850 after a death warrant had been signed by the governor. The trial court denied relief, but we stayed Meeks' execution and remanded the cause for an evidentiary hearing on the issue of ineffective assistance of trial counsel during the sentencing phase of the trial. *Meeks v. State*, 382 So.2d 673 (Fla.1980). After denial of his rule 3.850 motion on remand, Meeks again appealed and this Court affirmed. The Court found that neither trial counsel's alleged failure to ask for additional peremptory challenges during jury selection nor counsel's introduction of evidence during the penalty phase in which he attempted to demonstrate that Meek's codefendant was the more dominant participant constituted ineffectiveness. *Meeks v. State*, 418 So.2d 987 (Fla.1982), *cert. denied*, 459 U.S. 1155, 103 S.Ct. 799, 74 L.Ed.2d 1002 (1983).

Meeks then petitioned for federal habeas corpus relief in the United States District Court, and relief was denied in 1985. He appealed to the Eleventh Circuit, which stayed his second scheduled execution pending its review of his claim on the merits. In 1987, while Meeks' appeal was still pending, the United States Supreme Court rendered its decision in *Hitchcock v. Dugger*. Consequently, Meeks moved for leave from the Eleventh Circuit to present his *Hitchcock* claim to this Court. The motion was granted. *Meeks v. Dugger*, No. 87-3281 (11th Cir. Nov. 18, 1987) (order granting leave to present *Hitchcock* claim).

In *Hitchcock*, the United States Supreme Court found it was error for the trial court to instruct the jury to consider only statutorily enumerated mitigating circumstances and for the court to sentence a defendant to death if the trial judge only considered those same statutory mitigating circumstances. We have previously recognized that the recent *Hitchcock* decision represents a sufficient change in the law to defeat a claim that the issue is procedurally barred. *See, e.g., Thompson v. Dugger*, 515 So.2d 173 (Fla.1987), *cert. denied*, 485 U.S. 960, 108 S.Ct. 1224, 99 L.Ed.2d 424 (1988); *Demps v. Dugger*, 514 So.2d 1092 (Fla.1987); *Delap v. Dugger*, 513 So.2d 659 (Fla.1987). In prior cases involving *Hitchcock* claims, we have recognized that errors may require a new sentencing hearing while in others we have applied the harmless error rule. *See, e.g., Riley v. Wainwright*, 517 So.2d 656 (Fla.1987); *Thompson v. Dugger; Morgan v. State*, 515 So.2d 975 (Fla.1987), *cert. denied*, 486 U.S. 1036,

108 S.Ct. 2024, 100 L.Ed.2d 610 (1988). *But see Delap v. Dugger; Demps v. Dugger; Tafero v. Dugger*, 520 So.2d 287 (Fla. 1988).

Meeks' *Hitchcock* claim asserts: (a) that the record clearly establishes that the sentencing judge believed he could consider only statutory mitigating circumstances; (b) that the sentencing judge instructed the jurors accordingly and, in doing so, excluded available nonstatutory mitigating evidence; and, (c) that Meeks' defense counsel was also restricted by the then-prevailing statutory construction and thus failed to investigate, develop, and present available nonstatutory mitigating evidence regarding Meeks' character and background, and his emotional, intellectual, and psychological deficiencies. In support of his position, Meeks presented the affidavit of his trial attorney, wherein the attorney stated that he felt constrained by the language of the statute and did not investigate any other possible mitigating circumstances. Meeks also offered the report of a psychologist prepared January 25, 1988. The results in the report suggest several mitigating circumstances: that Meeks is easily led, suffers from a plethora of mental problems, has difficulty with abstraction and concept formulation, comes from a background of poverty and depravation, has abused alcohol and drugs from an early age, and was in fact under the influence at the time of the offense. Further, Meeks submitted the affidavits of two of his sisters and his mother, chronicling his underprivileged childhood.

[1] Because of the erroneous jury instruction, the state concedes that the record establishes a *Hitchcock* violation but maintains the error is harmless. It argues that the record establishes "beyond a reasonable doubt that, after weighing the aggravating factors against the statutory and nonstatutory mitigating factors, the judge would have properly imposed death, regardless of a life recommendation." *Demps*, 514 So.2d at 1094. We might accept this proposition if we look only at the face of the record. However, according to the affidavits filed with this motion, Meeks' counsel did not seek to develop nonstatutory mitigating evidence because he was constrained by the then-prevailing statutory construction. These affidavits assert that substantial nonstatutory mitigating evidence could have been presented, including the fact that Meeks had been a patient in a state mental hospital, that he had received subsequent treatment with psychotropic medication, that he had a history of drug and alcohol abuse, and that he suffered from severe emotional problems as a result of his deprived childhood. On their face, the contents of these affidavits are sufficient to negate the conclusion that the *Hitchcock* error was harmless. The merits of the claims can only be determined by an evidentiary hearing.

[2] Pursuant to our decision in *Hall v. State*, 541 So.2d 1125 (Fla.1989), *Hitchcock* claims should now be raised by motion for postconviction relief. However, Meeks' petition for habeas corpus was filed before our decision in *Hall*. Therefore, we remand this case to the trial court for an evidentiary hearing directed to the *Hitchcock* allegations of this petition as if they had been filed pursuant to Florida Rule of Criminal Procedure 3.850. The issue to be decided will be whether the *Hitchcock* error was harmless. In the event the court decides that the error was not harmless beyond a reasonable doubt, the sentences of death should be set aside and new sentencing proceedings conducted before separate juries.[3]

It is so ordered.

3. We deny the claims of ineffective assistance of appellate counsel. We deny as procedurally barred Meeks' remaining claims, to wit: (1) improper doubling of aggravating factors; (2) improper use of psychiatric reports in penalty-phase proceedings; (3) erroneous jury instruction on weighing of aggravating and mitigating circumstances; (4) erroneous jury instruction on vote necessary to recommend life imprisonment; (5) failure to instruct on underlying felony in felony-murder instruction; (6) insufficient *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), remand; (7) jurors' sense of responsibility was diminished as in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

SHAW, C.J., and McDONALD and GRIMES, JJ., concur.

KOGAN, J., concurs specially with an opinion, in which BARKETT, J., concurs.

OVERTON, J., dissents with an opinion.

KOGAN, Justice, specially concurring.

Although I agree with the general thrust of the majority opinion and its result, I believe the majority does not address some of the issues in sufficient detail. I write separately to clarify and elaborate what I believe the law now requires.

First, in *Hall*, we stated:

> If, when this opinion is filed, inmates under pending death warrants have filed habeas corpus petitions seeking relief under *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), we will consider those petitions. All *Hitchcock* claims raised after this opinion is filed, however, must be presented in a rule 3.850 motion for postconviction relief filed with the trial court.

Hall, 541 So.2d 1125, 1128 n. 4 (Fla.1989). As the majority concedes, Meeks' present petition for habeas corpus preceded *Hall*. Moreover, this petition was filed as a result of death warrants signed by the governor. Therefore, *Hall* is no bar to our consideration of issues to the extent they are purely legal in nature.

However, I believe the present case does involve factual questions that require resolution in an adversarial setting that can exist only in the trial court. Accordingly, I agree that this case must be remanded to the trial court, not because it fails to meet the requirements of *Hall*, but because it involves factual issues this Court is not in the best position to decide.

Second, I believe that both this Court and the trial court now must directly confront the root cause of the problem we face today: This Court's own inconsistent pronouncements on the admissibility of mitigating evidence during trials conducted in the 1970s. This includes the trial of Douglas Ray Meeks in 1975.

In the 1970s, because of our own erroneous interpretation of federal case law, this Court directly barred capital defendants from presenting any mitigating evidence other than that described in the narrow list contained at that time in section 921.141(7), Florida Statutes (1975). *E.g., Cooper v. State*, 336 So.2d 1133, 1139 & 1139 n. 7 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977).

In 1978, the United States Supreme Court declared such a practice invalid in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Only weeks later, this Court disingenuously stated that *Cooper* and other cases never had restricted defendants solely to the statutory list. In *Songer v. State*, 365 So.2d 696, 700 (Fla.1978) (on rehearing), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), we retroactively amended *Cooper* with a few sentences arguing that our precedents "indicate unequivocally that the list of mitigating factors is not exhaustive." *Id.*

Yet, *Cooper* plainly and directly reveals this remark to be untrue. In *Cooper*, we stated:

> The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the *itemized aggravating and mitigating circumstances*. Evidence concerning other matters have [sic] no place in that proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal. Such evidence threatens the proceeding with the undisciplined discretion condemned in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Cooper, 336 So.2d at 1139 (emphasis added). Then in a footnote we elaborated:

> The legislative intent to avoid condemned arbitrariness pervades the statute. Section 921.141(2) requires the jury to render its advisory sentence "upon the following matters: (a) Whether sufficient aggravating circumstances exist *as enumerated in subsection (6);* (b) Whether sufficient mitigating circumstances exist *as enumerated in subsection (7),* which

> outweigh the aggravating circumstances found to exist...." (emphasis added). This limitation is repeated in Section 921.-141(3), governing the trial court's decision on the penalty. Both sections 921.-141(6) and 921.141(7) begin with words of mandatory limitation. This may appear to be narrowly harsh, but under *Furman undisciplined* discretion is abhorrent whether operating for or against the death penalty.

Id. n. 7 (emphasis in original).

Finally, *Cooper* directly applied this analysis by holding that nonstatutory mitigating evidence could *not* be admitted. *Id.* Specifically, *Cooper* held that a trial court did not err by excluding evidence about the defendant's prior employment record and potential for rehabilitation.[4] *Id.* at 1139. The Court then concluded:

> In any event, the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty for "the most aggravated and unmitigated of serious crimes," and *we are not free to expand the list.*

Id. (emphasis added; footnote omitted).

Only two years later, in *Songer*, we did exactly what we said we could not do: We judicially expanded the list to conform to *Lockett*.[5]

The serious error that occurred in *Cooper* is only underscored by the subsequent procedural history of that case. In *Cooper v. Dugger*, 526 So.2d 900, 902 (Fla.1988), we vacated Mr. Cooper's death penalty in part because "the trial judge ... operated under a mistaken belief that Florida law required exclusion of nonstatutory mitigating evidence." Thus, we remanded for a new sentencing proceeding that would include presentation of the exact same evidence we earlier had deemed inadmissible. *Cooper*, 336 So.2d at 1139.

The effect of this remarkable inconsistency is that some defendants tried in the 1970s have been cast into a catch-22. Under *Cooper* and prior to *Songer*, they were forbidden to introduce any mitigating evidence other than that described in the statute. Attorneys, such as the one who represented Meeks in 1975, complied with what then was the law. They did not attempt to introduce this "unlawful" evidence.

Then, suddenly, *Songer* changed the rules retroactively. It declared that defendants *always* had had the ability to present nonstatutory mitigating evidence. This necessarily created confusion about what the law actually required prior to *Songer*.

As a result, some capital defendants face the denial of rights clearly guaranteed by *Lockett* and *Hitchcock*.[6] They potentially are subject to a procedural bar for failing to introduce mitigating evidence that, at the time, could not lawfully have been admitted in Florida. At other times, this Court has simply found "no merit" to what essentially are *Hitchcock* claims because there was no substantial mitigating evidence to be found anywhere in the record. In effect, this Court sometimes has held that attorneys who honored the spirit and

4. This holding clearly was wrong, as we ourselves have subsequently recognized. *McCampbell v. State*, 421 So.2d 1072, 1075–76 (Fla.1982).

5. This act alone was highly suspect. As we frequently have stated, a statute cannot be rendered constitutional if this can be accomplished only "by a bald judicial amendment similar to a legislative enactment." *Brown v. State*, 358 So.2d 16, 20 (Fla.1978) (quoting *State v. Mayhew*, 288 So.2d 243, 252 (Fla.1973) (Ervin, J., dissenting)). A bald judicial amendment is precisely what *Songer* achieved.

6. The state argues that *Lockett* and *Hitchcock* somehow address different issues. I disagree with the state's interpretation as applied to this case. Both *Lockett* and *Hitchcock* rested on the proposition that "'"the sentencer"' may not refuse to consider or '"be precluded from considering"' any relevant mitigating evidence." *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 1822 (1987) (quoting *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 1671, 95 L.Ed.2d 347 (1986) & citing *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964–65, 57 L.Ed.2d 973 (1978) (plurality opinion)). Here, this Court's own erroneous interpretation of the law coupled with the words of limitation contained in the sentencing statute precluded Florida sentencers from considering relevant mitigating evidence before 1978. *See Cooper v. State*, 336 So.2d 1133, 1139 & 1139 n. 7 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977).

letter of *Cooper*—and thus failed to introduce nonstatutory mitigating evidence in the 1970s—simply waived their clients' rights under *Lockett* and *Hitchcock*.

The present case is virtually devoid of nonstatutory mitigating evidence. The primary, if not exclusive, reason for this omission is that Meeks' lawyer was obeying the dictates of the law as described in both *Cooper* and the relevant statutory language. In the present case, the trial occurred one year *before* our opinion in *Cooper*. I thus can only conclude that *Cooper* correctly describes the way in which Florida judges and lawyers regarded nonstatutory mitigating evidence during the relevant periods of time.

Cooper and *Songer*, read together with an honest and objective mind, reveal a serious injustice that now must be corrected. I believe the only fair thing is to require the trial court to order the resentencing of any capital defendant if: (a) the trial occurred prior to *Songer;* (b) reliable sworn testimony is presented in a rule 3.850 proceeding establishing that the reason for not introducing available nonstatutory mitigating evidence was because of a belief it was inadmissible under the statutes or under *Cooper;* and (c) counsel has presented reliable sworn testimony from persons competent to be witnesses whose testimony at a new sentencing proceeding will establish the existence of substantial nonstatutory mitigating evidence not previously introduced.

Obviously, the state should be afforded an opportunity through appropriate cross-examination to demonstrate that the alleged mitigating evidence in fact is insubstantial.

The need for a hearing is triggered by a petition filed under rule 3.850 incorporating affidavits that, if unrebutted, would establish the existence of the factors outlined above. After that hearing, a new sentencing before a jury must be ordered if the totality of the evidence supports the affidavits and thus establishes the existence of the three factors.

This analysis is entirely consistent with the prevailing view of *Lockett* employed by the federal courts, which frequently have rejected this Court's disposition of *Lockett/Hitchcock* issues. *See, e.g., Smith v. Dugger,* No. TCA 90-400350WS, slip op. (N.D.Fla., June 8, 1990) (citing cases). Indeed, Judge Stafford's learned analysis of this issue in *Smith* strongly supports the three-part test stated above. Judge Stafford has stated:

> [I]n reviewing a *Hitchcock* claim, a federal district court must first determine whether there was any credible nonstatutory mitigating evidence that the jury either did hear *or could have heard* had the teachings of *Hitchcock* and its progeny been known at the time. If, after reviewing the entire record, the court concludes that petitioner has failed to produce or proffer any credible nonstatutory mitigating evidence, then the court must find the *Hitchcock* error, if any, was harmless. If, as here, petitioner produces *substantial* mitigating evidence, the federal district court will likely find the exclusion of such evidence to be harmful error, because the presumption of prejudice will be very difficult for the state to rebut.

Id. at 13 (first emphasis added; second emphasis in original). Judge Stafford then went on to reject the state's claim that the failure to present nonstatutory mitigating evidence at Smith's trial barred consideration of that evidence in a collateral challenge based on *Lockett* and *Hitchcock:*

> [T]he court notes that defense counsel's tactical decisions were made *in the context of the law as it then existed.* The standard jury instruction promulgated under such law informed jurors that "the mitigating circumstances which you may consider, if established by the evidence, are these [listing the seven statutory mitigating factors]." The record makes it evident that counsel developed both his strategies as well as his arguments *under the constraints of that jury instruction.* To do so was reasonable at the time. Only later did the Supreme Court decide that it was error for the trial court to give the constraining instruction.

Id. at 18 (citation omitted; emphasis added). Based on this analysis, Judge Stafford ordered relief in *Smith*, despite the fact this Court had denied such relief. *Smith v. State*, 556 So.2d 1096 (Fla.1990).

The holding in *Smith* is all the more compelling in the present case. At the time of the Smith trial, which occurred after *Songer* was issued, the principal error in Florida death-penalty law was the erroneous standard jury instruction, cited by Judge Stafford. This instruction appeared to limit judge and jury solely to considering the statutory mitigating factors even if some nonstatutory mitigating evidence had been presented. This error was *far less* serious than the straightforward, unqualified exclusion of such evidence announced in *Cooper*, under whose teachings Meeks apparently was tried. Thus, Judge Stafford's analysis is compellingly applicable to Florida capital trials conducted prior to *Songer*.

Applying the above analysis to the present case, I conclude that Meeks clearly has produced affidavits that now require a full evidentiary hearing. Meeks' trial occurred in 1975, before *Songer*, and this record is virtually devoid of nonstatutory mitigating evidence. Moreover, the present petition contains affidavits from persons apparently competent to be witnesses, and their testimony apparently embodies substantial nonstatutory mitigating evidence. This includes evidence that petitioner had been a patient in a state mental hospital; that he had received subsequent treatment with psychotropic drugs; that he had a history of drug and alcohol abuse; and that he suffered severe emotional problems as a result of a deprived childhood. Thus, the majority correctly concedes that this evidence facially is sufficient to render the *Hitchcock* error harmful. Majority op. at 716. In this assessment, I must agree.

The present record also contains an affidavit from John F. Howard, Meeks' trial counsel. It states that "I believed that the Florida death penalty statute restricted the introduction of evidence in mitigation of sentence to only that which directly related to the mitigating factors set out in the statute." The majority also acknowledges this statement. *Id.* at 716.

Thus, I agree with the majority that a hearing in the trial court now is required. I also believe that this hearing must employ the three-part test described above. If the evidence adduced in this manner supports Meeks' affidavits on all three points, the trial court will have no choice but to order a new sentencing hearing.

BARKETT, J., concurs.

OVERTON, Justice, dissenting.

I dissent. Meeks killed two convenience store clerks in separate robberies. Although there was a *Hitchcock* error, I would find that the error was harmless. Previously, this Court applied the harmless error analysis to a *Hitchcock* violation in *Demps v. Dugger*, 514 So.2d 1092 (Fla. 1987), and found that "the presentence investigation report, considered by the court, countered much of the nonstatutory mitigating evidence." *Id.* at 1093. Similarly, in *Delap v. Dugger*, 513 So.2d 659 (Fla. 1987), this Court found the *Hitchcock* error to be harmless, concluding that the five existing aggravating circumstances outweighed the mitigating evidence.

Consistent with *Demps* and *Delap*, I would find that the available mitigating evidence is insufficient, given the aggravating circumstances. The reports of the two psychiatrists who examined Meeks prior to trial contain background information recognized by the trial judge in both sentencing orders, including an express finding of Meeks' low intelligence. The mental health evidence was admissible under section 921.-141(6)(b) and (f), Florida Statutes (1987). Further, I do not find that the repetitive testimony from Meeks' family concerning his childhood enables the mitigating evidence to outweigh the aggravating circumstances. I would hold that the four aggravating circumstances found in the Thomp-

son murder case and the five aggravating circumstances in the Walker murder case outweigh beyond any reasonable doubt the available mitigating evidence. I find that the error was harmless in this cause. Accordingly, I would deny Meeks' petition for a writ of habeas corpus.

Our study of the matter leads us to conclude that the district court did not abuse its discretion in refusing to permit Reyes and Ferrara to testify that Sanchez had told him that the drugs in question belonged to him. Sanchez's unavailability was not really shown. See Rule 804(a). Counsel merely stated that Sanchez's lawyer had indicated to him that if called as a witness in Perez's trial, Sanchez would refuse to testify. Counsel did orally advise the district court that he had subpoenaed Sanchez, and produced a copy of the subpoena, although no return of service was filed.

Further, we also agree with the district court that there was little or no showing of "corroborating circumstances clearly indicating the trustworthiness" of Sanchez's alleged statements concerning ownership of the drugs, as is required by 804(b)(3). For example, the fact that an access card to storage unit # 766 was found in a search of Sanchez's residence does not necessarily mean that Sanchez owned the drugs in question.

In *United States v. Lopez*, 777 F.2d 543 (10th Cir.1985), a case relied on by Perez, we did hold that the district court erred in excluding the exculpatory statement made by a co-defendant to his attorney. However, the "corroborative circumstance" found in that case is not present in the instant case. There the defendant's fingerprints were *not* on certain boxes containing cocaine, whereas the fingerprints of his co-defendant, whose statements the defendant sought to introduce, were. In our case, Sanchez's prints were *not* on the Kerr jars, but Perez's prints were.

Rule 804(b)(3) concerns a statement tending to expose the declarant to criminal liability and "offered to exculpate the accused...." In this connection, we note that although Sanchez's statement that the drugs here involved "belonged" to him might well tend to incriminate him, such statement, however, would not necessarily "exculpate" Perez. Perez was charged with the possession of heroin and cocaine, or with aiding and abetting in such possession. He was not charged with legal ownership thereof, and legal ownership did not have to be proven by the prosecution. The drugs may indeed have "belonged" to Sanchez, and at the same time been in Perez's possession. After all, they were seized in a search of Perez's storage unit, and the Kerr jars containing the heroin bore only his fingerprints. Certainly, at the very least, Perez was, in the language of 18 U.S.C. § 2, "aiding and abetting" the unlawful possession. In any event, since the proffered, but refused, testimony did not tend to exculpate Perez from the crimes with which he was charged, any possible error was necessarily harmless.

Judgment affirmed.

Douglas Ray MEEKS, Petitioner–Appellant,

v.

Harry K. SINGLETARY, Secretary, Florida Department of Offender Rehabilitation, and Tom Barton, Superintendent of Florida State Prison at Starke, Florida, Respondents–Appellees.

No. 87–3281.

United States Court of Appeals, Eleventh Circuit.

May 29, 1992.

Petitioner was convicted in the Circuit Court, Taylor County, John Royce Agner, J., of first-degree murder and was sentenced to death. Petitioner appealed. The Florida Supreme Court, 336 So.2d 1142, affirmed. Petitioner sought habeas corpus relief. The United States District Court for the Northern District of Florida, No. TCA–80–746, Maurice Mitchell Paul, J., denied petition without evidentiary hearing. Petitioner appealed. The Court of Appeals, Tjoflat, Chief Judge, held that: (1) mere occurrence of full and fair hearing in state

court did not neutralize right to evidentiary hearing; (2) counsel's failure to address more than two habeas claims at status hearing did not result in abandonment of claims not argued; and (3) statement by Florida Supreme Court that "almost all" of petitioner's claims had been procedurally defaulted did not justify decision not to consider those claims.

Reversed and remanded.

1. Habeas Corpus ⇐766

Mere occurrence of full and fair hearing in state court did not neutralize habeas petitioner's right to evidentiary hearing in federal court. 28 U.S.C.A. § 2254.

2. Habeas Corpus ⇐742, 767

Once habeas petitioner alleges facts that would entitle petitioner to relief, evidentiary hearing may not be required if state court has made findings as to those very facts. 28 U.S.C.A. § 2254(d).

3. Habeas Corpus ⇐602

Counsel's failure to address more than two habeas claims at status hearing did not result in abandonment of claims not argued; there was no inquiry or notice by court.

4. Habeas Corpus ⇐401, 404

Statement by Florida Supreme Court that "almost all" of petitioner's claims had been procedurally defaulted did not justify decision not to consider those claims, in that procedural default could be excused by showing of cause and prejudice or fundamental miscarriage of justice as result of failure to consider claims. 28 U.S.C.A. § 2254.

5. Habeas Corpus ⇐401, 774

State court's finding of procedural default with respect to given claim does not automatically raise procedural bar against consideration of that claim on federal habeas. 28 U.S.C.A. § 2254.

6. Habeas Corpus ⇐406

Federal habeas petitioner may establish cause for procedural default by demonstrating ineffective assistance on direct appeal. 28 U.S.C.A. § 2254; U.S.C.A. Const. Amend. 6.

Stephen D. Stitt, Key West, Fla., Billy N. Nolas, Tallahassee, Fla., Julie D. Naylor, Ocala, Fla., for petitioner-appellant.

Richard E. Doran, Carolyn Snurkowski, Asst. Attys. Gen., Tallahassee, Fla., for respondents-appellees.

Appeal from the United States District Court for the Northern District of Florida.

Before TJOFLAT, Chief Judge, ANDERSON, Circuit Judge, and CLARK, Senior Circuit Judge.

TJOFLAT, Chief Judge:

Douglas Ray Meeks is a Florida prison inmate. In two separate trials, Meeks was convicted of first degree murder and sentenced to death. Meeks appeals from an order of the United States District Court for the Northern District of Florida denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254 (1988), without an evidentiary hearing.

We reverse the district court's denial of habeas relief and remand the case for proceedings consistent with this opinion.

I.

The extended procedural history of this case has been outlined in a recent opinion by the Florida Supreme Court. *See Meeks v. Dugger*, 576 So.2d 713 (Fla.1991). In that opinion, the Florida Supreme Court remanded the case to the state trial court for an evidentiary hearing to determine whether jury instructions given at the sentencing phases of both trials in violation of *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), constituted harmless error. *Meeks*, 576 So.2d at 716. Proceedings in the state trial court have been held in abeyance pending our disposition of this appeal.

In his amended federal habeas petition, Meeks asserted thirteen "grounds of illegality of [his] convictions and death sen-

tences."[1] The district court addressed the merits of only two grounds for relief: (1) petitioner's counsel rendered ineffective assistance during the guilt and sentencing phases of petitioner's trials, and (2) petitioner's death sentences were the product of racial discrimination in violation of petitioner's right to equal protection as guaranteed by the Equal Protection Clause of the Fourteenth Amendment, and in violation of petitioner's right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments.[2] In support of its finding that "only the two issues named above remain," the district court explained:

> Since the remaining grounds asserted in the petition for writ of habeas corpus have never formally been abandoned, the Court notes the following in support of its judgment that only the two issues named above remain. First, as early as December 6, 1983 counsel for petitioner stated in a letter to the court (doc 25) that only two issues remained to be resolved (one of which was effectiveness of counsel). Second, as recently as the status conference of June 6, 1985, only the two issues named above were argued by petitioner's counsel. Finally, the Florida Supreme Court was presented with almost all of the issues asserted in the instant petition. In *Meeks v. State*, 382 So.2d 673 (Fla.1980) that Court held that all of petitioner's claims *except* ineffective assistance of counsel and racial discrimination were barred by procedural default.

(Emphasis in original.)

We note at the outset that the district court's reasons for addressing but two of petitioner's claims remain unclear. As the court correctly remarked, petitioner never formally abandoned any claims. The court's order suggests that the court failed to address the merits of petitioner's remaining claims because he informally abandoned them and because the Florida Supreme Court had found some, but not all, of the remaining claims to have been procedurally defaulted. The court's order permits at least three interpretations. First, the court found that petitioner had abandoned the remaining claims, a conclusion supported by the Florida Supreme Court's finding of procedural default as to "almost all" the remaining issues. Second, although the court found that petitioner never had abandoned the remaining claims, a letter by petitioner's counsel to the court and that counsel's arguments at a status hearing, synergetically combined with the Florida Supreme Court's finding of procedural default as to "almost all" the remaining claims, somehow relieved the district court of its obligation to consider these claims. Finally, the court found both that petitioner had abandoned the remaining claims, and that he was procedurally barred from raising any of them in federal court due to the Florida Supreme Court finding of procedural default as to "almost all" of them.

For purposes of this opinion, we adopt the third, and most charitable, reading of the district court's order. We first address the two claims the district court decided to consider on the merits: "ineffective assistance of counsel" and "racial discrimination." The latter claim is without merit in light of *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). Before delving into a discussion of the ineffectiveness claim the district court did discuss, we briefly comment on the ineffectiveness claim it did not. Petitioner raised two distinct claims of ineffective assistance of counsel, one pertaining to his counsel's performance at the guilt and sentencing phases of his two trials, the other relating to that counsel's performance on appeal from petitioner's convictions and sentences.

1. Meeks originally filed separate federal habeas petitions challenging the conviction and sentence resulting from each of his two state trials. He later moved to consolidate his petitions into one petition. For convenience's sake, this opinion does not distinguish between identical challenges to the conviction or sentence in one trial and to the conviction or sentence in the other.

2. Properly speaking, the latter "ground of illegality" alleged two constitutional violations and thereby encompassed two claims for relief. *See Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir.1992) (en banc).

As the State's response had done, the district court's order addressed only the former claim of ineffectiveness. Even the catch-all phrase at the end of the court's order refers solely to trial counsel's errors at trial and makes no reference to errors on appeal: "Having reviewed the complete record and all of petitioner's remaining assertions of errors by trial counsel, it is the judgment of this Court that no such errors were reasonably likely to have an effect on petitioner's trials sufficient to warrant reversal." On remand, we direct the district court to address petitioner's claim of ineffectiveness of counsel on appeal.

The court refused to hold an evidentiary hearing on petitioner's claim of ineffectiveness of counsel at trial because petitioner had received a full and fair hearing on this issue in the state court. The district court's discussion of petitioner's claim of ineffectiveness of counsel at trial, much like the State's response, consisted mostly of a summary of testimony given at the hearing on petitioner's motion pursuant to Fla.R.Crim.P. 3.850 in state trial court.

[1, 2] The mere occurrence of a full and fair hearing in the state court, however, does not neutralize petitioner's right to an evidentiary hearing in federal court. "It is well established that a habeas petitioner is entitled to an evidentiary hearing on a claim *if he or she alleges facts that, if proved at the hearing, would entitle petitioner to relief.*" *James v. Singletary*, 957 F.2d 1562, 1573 n. 17 (11th Cir.1992) (citing *Townsend v. Sain*, 372 U.S. 293, 313, 83 S.Ct. 745, 757, 9 L.Ed.2d 770 (1963); *Thomas v. Zant*, 697 F.2d 977, 983 (11th Cir.1983)). True, once a petitioner alleges such facts, and Meeks clearly does, an evidentiary hearing may not be required if a state court has made findings as to those very facts. State court fact findings would then be entitled to a presumption of correctness under 28 U.S.C. § 2254(d).

In the present case, however, the rule 3.850 trial court never made any fact findings pertaining to petitioner's claims of ineffective assistance at trial and on appeal.[3] The Florida Supreme Court's opinion affirming the rule 3.850 court contains at most one passage that conceivably could be interpreted as a fact finding.[4] In its most recent opinion, the Florida Supreme Court summarily, and without any fact findings, rejected petitioner's claim of ineffectiveness on appeal. *Meeks v. Dugger*, 576 So.2d 713, 716 n. 3 (Fla.1991).

Motivated by the mistaken belief that the mere occurrence of a full and fair hearing in state court obviates the need for an evidentiary hearing in federal court, the district court, of course, made no reference to any findings by any state court. Accordingly, we hold that petitioner is entitled to an evidentiary hearing on his claims of

3. The Florida Supreme Court quoted the relevant portions of the trial court's findings in *Meeks v. State*, 418 So.2d 987, 988 (Fla.1982):

> From the vantage point of hindsight of five years, defendant, through his present counsel, assaults the conduct of his defense by his former counsel. Although told that his former counsel was present for testimony, defendant did not choose to call him to explain his conduct of the trial and appeal. The State did not call former counsel. Nor did the Court. Thus, counsel whose conduct of the trial and appeal is in question did not testify.
>
> Both defendant and the State did call attorneys to testify as expert witnesses. Opinions were expressed by them as to trial counsel's effectiveness. Defendant also made proffers as to racial attitudes in Taylor County as they existed at trial time and at the present as well as concerning defendant's background. Upon consideration, the court finds that the greater weight of the evidence does not support defendant's contention that he did not receive reasonably effective assistance of counsel.
>
> Tactics and strategy of counsel at trial, just as tactics and strategy of counsel at the instant evidentiary hearing, are areas that the trial judge could frequently be tempted to question. The court attempts to refrain from doing so lest it usurp counsel's role.
>
> Upon consideration of the evidence, the court finds that defendant received reasonably effective assistance of counsel at trial and upon appeal based upon the totality of circumstances of these cases.

4. "We find this record [the trial transcript? the rule 3.850 petition? the rule 3.850 hearing?] does not establish any identifiable deficiencies in [Meeks'] trial counsel's voir dire examination; nor do we find his asserted failure to ask for additional peremptory challenges an erroneous omission by counsel necessitating a conclusion of ineffectiveness." *Meeks*, 418 So.2d at 988.

ineffective assistance of counsel at trial and on appeal.[5]

We now discuss the district court's grounds for not addressing all but two of petitioner's claims: abandonment and procedural default. Although the district court acknowledges that petitioner never "formally" abandoned any claims, it cites a letter from petitioner's counsel to the court of December 6, 1983, and the status conference of June 6, 1985, in support of its conclusion that petitioner, presumably informally, had abandoned all but two claims. Our review of the letter and the transcript of the status hearing has failed to produce any evidence that petitioner abandoned any claims. Certainly, neither the letter nor the transcript of the status conference permits the conclusion that petitioner knowingly, voluntarily, or intentionally abandoned any claim. *See Potts v. Zant*, 638 F.2d 727, 742, 747–51 (5th Cir. Unit B), *cert. denied*, 454 U.S. 877, 102 S.Ct. 357, 70 L.Ed.2d 187 (1981); *Potts v. Zant*, 734 F.2d 526, 528–29 (11th Cir.1984), *cert. denied sub nom. Kemp v. Potts*, 475 U.S. 1068, 106 S.Ct. 1386, 89 L.Ed.2d 610 (1986).

First, the December 6 letter simply did not contain the statement the district court ascribed to it. Instead of stating "that only two issues remained to be resolved," the letter remarked that "one of the two primary issues in Mr. Meeks' case is the sufficiency of legal representation at trial, sentencing, and direct appeal." The letter responded to a May 31, 1983, order to show cause why Meeks' petition ought not be granted, and to indicate the time needed for an evidentiary hearing. The letter nowhere seeks to narrow the issues before the district court. Instead, it dovetailed the petitioner's November 30 motion for continuance of the evidentiary hearing—which never materialized—pending the resolution of the ineffective assistance issue in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which at that time was before the United States Supreme Court.

[3] Likewise, nothing in the transcript of the status hearing as much as hints at abandonment of any claims. The district court's correct observation that petitioner's counsel argued only the two claims the court later decided to address on the merits does not support a finding of abandonment. Without belaboring the point, we hold that a finding of abandonment of any claims based on counsel's failure to address all claims at the status hearing in the case, without inquiry or notice by the court, constitutes a "trap for the unwary" we cannot countenance. *See Lefkowitz v. Newsome*, 420 U.S. 283, 293, 95 S.Ct. 886, 891, 43 L.Ed.2d 196 (1975).

[4–6] The district court's other rationale for not addressing more than two of petitioner's thirteen claims, namely its reference to the Florida Supreme Court's statement that "almost all" of petitioner's claims had been procedurally defaulted, rests on similarly shaky ground. First, a state court's finding of procedural default with respect to a given claim does not automatically raise a procedural bar against consideration of that claim on federal habeas. A federal habeas petitioner may excuse state procedural default of a claim either by "demonstrat[ing] cause for the default and actual prejudice as a result of the alleged violation of federal law," or by establishing "that failure to consider the claim[ ] will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, — U.S. —, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991); *see also McCleskey v. Zant*, — U.S. —, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991). In particular, a federal habeas petitioner may establish cause by demonstrating ineffective assistance on direct appeal. *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); *see also Coleman*, — U.S. at —, 111 S.Ct. at 2567–68. As mentioned above, Meeks presented a claim of ineffectiveness on appeal, though the district court ignored it in its order. Moreover, even if petitioner

5. On remand, the district court will have to determine which state court findings, if any, constitute findings of fact entitled to a presumption of correctness. We further note that the State, by failing to address the issue, has waived the defense that petitioner may not present to the district court any instances of alleged ineffectiveness not raised in state court.

should not succeed in excusing his failure timely to raise the claims found by the Florida Supreme Court to have been procedurally defaulted, the Florida Supreme Court's 1980 finding obviously does not affect claims petitioner had not even raised at that time. The district court itself acknowledges that Meeks' petition contains such claims by observing that the Florida Supreme Court in 1980 had found "almost all" of petitioner's remaining claims to have been defaulted.

On remand, we instruct the district court carefully to discern exactly which claims the Florida Supreme Court identified as procedurally defaulted. With respect to these claims, the district court must then consider whether petitioner can demonstrate either cause and prejudice for his default, or a fundamental miscarriage of justice. The district court should address the merits of all other claims, unless it can articulate its reason or reasons for not doing so.

II.

For the reasons stated above, we REVERSE the denial of habeas corpus relief and REMAND the case for proceedings in accordance with this opinion.

IT IS SO ORDERED.

Robert E. PENTON, Sr.,
Plaintiff-Appellee,

v.

POMPANO CONSTRUCTION CO., INC., and Futch Leasing, Inc.,
Defendants,

Futch Construction, Inc.,
Defendant-Appellant.

No. 90-5469.

United States Court of Appeals,
Eleventh Circuit.

May 29, 1992.

On appeal from judgment entered in the United States District Court for the Southern District of Florida, No. 88-6549-CIV-JWK, James W. Kehoe, J., the Court of Appeals held that it lacked jurisdiction absent final judgment terminating case as to all of claims and parties.

Ordered accordingly.

1. Federal Courts ⇐600, 660.20

Court of Appeals lacked jurisdiction absent final judgment terminating case as to all of claims and parties; while district court did finally dispose of claims against appellant, that judgment was not entered pursuant to rule permitting appeal, upon determination of "no just reason for delay," from judgment upon one or more but less than all claims in action. 28 U.S.C.A. § 1291; Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

2. Federal Courts ⇐660.30, 725

Rather than dismiss appeal for lack of final judgment terminating case as to all claims and parties, court would allow 30 days for plaintiff, or appellant in his stead, to obtain judgment under rule permitting appeal, upon determination of "no just reason for delay," from judgment upon one or more but less than all claims in action; any timely appeal from judgment under that rule would be consolidated with current appeal, which would be dismissed, and new appeal would be disposed of on merits. 28 U.S.C.A. § 1291; Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

Gail Leverett, Miami, Fla., for defendant-appellant.

Darryl J. Tschirn, Metairie, La., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, EDMONDSON, Circuit Judge, and DYER, Senior Circuit Judge.

PER CURIAM:

[1] We lack jurisdiction in this case under 28 U.S.C. § 1291 (1990) because we do